

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,829

135

LEONARD E. SHELTON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM CRIMINAL JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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QUESTIONS PRESENTED

The questions are:

1. In view of the total absence of any incriminating evidence identifying appellant as one of the participants in the crime, and the failure of the prosecution to make out a prima facie case against appellant, did the trial court err in not directing a verdict of acquittal at the close of the government's case?

2. When it appeared there was no evidence that appellant participated in the robbery or assault on the store owner with a dangerous weapon and that these crimes were separate and distinct felonies, was it error to try appellant on three counts before the same jury since there was a substantial chance that this jury would erroneously conclude that the three charges were corroborative of one another?

3. When it appeared there was abundant evidence that Wayne Hudson participated in the crimes charged in all four counts against him and that he was guilty of inflammatory conduct in the presence of both court and jury, was it error to permit the same jury to decide the charges against appellant Leonard Shelton since it was likely that this jury would be prejudiced against all the defendants by reason of their reaction to the misconduct of Wayne Hudson?

INDEX

	<u>Page</u>
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF POINTS	13
SUMMARY OF ARGUMENT	14
ARGUMENT:	
I. IN VIEW OF THE TOTAL ABSENCE OF ANY INCRIMINATING EVIDENCE IDENTIFYING APPELLANT AS ONE OF THE PARTICIPANTS IN THE CRIME, AND THE FAILURE OF THE PROSECUTION TO PROVE A PRIMA FACIE CASE AGAINST APPELLANT, THE TRIAL COURT ERRED IN NOT DIRECTING A VERDICT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE	16
II. WHEN IT APPEARED THAT THERE WAS NO EVIDENCE THAT APPELLANT PARTICIPATED IN THE ROBBERY OR ASSAULT ON THE STORE OWNER WITH A DANGEROUS WEAPON AND THAT THESE CRIMES WERE SEPARATE AND DISTINCT FELONIES, IT WAS ERROR TO TRY APPELLANT ON THREE COUNTS BEFORE THE SAME JURY SINCE THERE WAS A SUBSTANTIAL CHANCE THAT THIS JURY WOULD ERRONEOUSLY CON- CLUDE THAT THE THREE CHARGES WERE CORROBORATIVE OF ONE ANOTHER	25
III. WHEN IT APPEARED THERE WAS ABUNDANT EVIDENCE THAT WAYNE HUDSON PARTICIPATED IN THE CRIMES CHARGED IN ALL FOUR COUNTS AGAINST HIM AND THAT HE WAS GUILTY OF INFLAMMATORY CONDUCT IN THE PRESENCE OF BOTH COURT AND JURY, IT WAS ERROR TO PERMIT THE SAME JURY TO DECIDE THE CHARGES AGAINST APPELLANT LEONARD SHELTON SINCE IT WAS LIKELY THAT THIS JURY WOULD BE PREJUDICED AGAINST ALL THE DEFENDANTS BY REASON OF THEIR REACTION TO THE MISCONDUCT OF WAYNE HUDSON	34

	<u>Page</u>
CONCLUSION	37
 <u>TABLE OF CASES</u>	
Blaine v. U. S., 136 F.2d 224, 286 (1943)	37
Byrd v. U. S., 119 U. S. App. D. C. 350, 342 F.2d 939 (1965)	22
Chambers v. U. S., 112 U. S. App. D. C. 240, 301 F.2d 564 (1962)	26
Cooper v. U. S., 94 U. S. App. D. C. 343, 345, 218 F.2d 39, 41 (1954)	21
*Cooper v. U. S., 123 U. S. App. D. C. 33, 357 F.2d 274 (1966)	21, 22
*Crawford v. U. S., ____ U. S. App. D. C. ____, 375 F.2d 332 (1967)	17, 20
*Curley v. United States, 81 U. S. App. D. C. 239, 392, 160 F.2d 229, 232 (1947)	16, 17, 24
*Drew v. U. S., 113 U. S. App. D. C. 11, 331 F.2d 85 (1964)	26, 27, 30, 32, 33
Dowling v. U. S., 249 F.2d 746 (1957)	35
Dunaway v. U. S., 92 U. S. App. D. C. 299, 300, 205 F.2d 23, 24 (1953)	26
*Goodwin v. U. S., 121 U. S. App. D. C. 9, 347 F.2d 793 (1965)	22, 23, 24
*Gregory v. U. S., ____ U. S. App. D. C. ____, 369 F.2d 125 (1966)	30
*Kidwell v. U. S., 33 App. D. C. 566, 570 (1912) . .	26, 27, 33
Long v. U. S., 124 U. S. App. D. C. 14, 360 F.2d 289 (1966)	20

*Cases chiefly relied upon are marked by asterisks.

	<u>Page</u>
McElroy v. U. S., 164 U. S. 76, 79 (1896)	30
Nye & Niessen v. U. S., 336 U. S. 613, 69 S. Ct. 766 (1949)	20
Peckham v. U. S., 93 U. S. App. D. C. 136, 140, 210 F.2d 693, 697-698 (1955)	26
Queen v. King, 1 Q. B. 214, 216 (1897)	32
Schaffer v. U. S., 362 U. S. 511 (1959)	35
*U. S. v. Bentvena, 319 F.2d 916, 931 (1963)	36
U. S. v. Haupt, 136 F.2d 661 (1943)	35
U. S. v. Lotsch, 102 F.2d 35 (2d Cir.), cert. den. 307 U. S. 622 (1949)	29
*Wilson v. U. S., 344 F.2d 166, 167 (1965)	36, 37

STATUTES AND OTHER MATERIAL

Federal Rules of Criminal Procedure, Rule 8(a)	25
Federal Rules of Criminal Procedure, Rule 14	25, 35
MOORE'S FEDERAL PRACTICE -- Cipes Criminal Rules, ¶ 8.05(?)	27

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,029

LEONARD E. SHELTON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM CRIMINAL JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

Appellant was tried on plea of not guilty before a jury in the United States District Court for the District of Columbia under an indictment charging infractions of the D. C. Code, Title 22, § 2901 (Robbery), § 502 (Assault with a dangerous weapon) and § 505(b) (Assault on a member of the police force with a deadly weapon). The District Court had jurisdiction under Title 11, D. C. Code § 521.

Appellant was found not guilty on Counts 1 and 2, but guilty on Count 3, and sentenced under the Federal Youth Corrections Act, Title 12, U. S. Code § 5010(b). Appellant has obtained leave to proceed in forma pauperis. Notice of appeal was timely filed.

The jurisdiction of the Court of Appeals is established by 28 U. S. Code § 1291.

STATEMENT OF THE CASE

Appellant was one of four men indicted on May 16, 1966, on three counts allegedly growing out of a chain of events that started with the robbery of a grocery store.^{1/} Upon pleas of not guilty, all four were tried before Judge George E. Hart, sitting with a jury on October 20, 24, 25, 27, November 1 and 3, 1966. Appellant was acquitted on Counts 1 and 2, but was found guilty on Count 3.^{2/}

^{1/} Appellant Leonard E. Shelton, Wayne T. Hudson, William H. Shelton, and Adolph P. Barber were indicted on three counts: 1. Robbery (violation of D. C. Code, Title 22, § 2901); 2. Assault with a dangerous weapon (violation of D. C. Code, Title 22, § 502); 3. Assault on a member of the police force with a deadly weapon (violation of D. C. Code, Title 22, § 505(b)). In addition, Wayne T. Hudson was charged with a fourth count of carrying a dangerous weapon (violation of D. C. Code, Title 22, § 5204).

^{2/} With regard to the other three men, the jury returned its verdict as follows: Wayne T. Hudson was found guilty on all four Counts; William H. Shelton was found guilty on Counts 1, 2, and 3; Adolph P. Barber was also found guilty on Counts 1, 2, and 3.

No evidence was introduced to establish that appellant was present at the grocery store or participated in the robbery in any way. However, the prosecution did introduce evidence that could be taken to establish that Wayne T. Hudson, William H. Shelton and Adolph P. Barber entered Food Plaza, Inc., on 441 Chaplin Street, S. E., at approximately 8:50 a.m., March 7, 1966, and at gunpoint, robbed the co-owner of the store, Mr. Sidney Hudes, of about \$2,700 and fled.

The prosecution also introduced evidence that could be taken to establish that several minutes after the holdup, Officer William L. Sampson of the 14th Precinct stopped a car at the corner of Burns and C Streets, S. E., for running a stop sign -- approximately 4 blocks from the Food Plaza (Tr. 240, 241, 245). Officer Sampson testified that he waved a white 1958 Chevrolet over to the side of the road, approached and asked the driver for his driver's permit and registration card (Tr. 245). He said that William H. Shelton, who was driving the car, handed over his driver's permit (Tr. 247, 248) and that appellant, who was identified by him as the passenger sitting directly behind the driver in the back seat (Tr. 252), handed him a registration card (Tr. 251, 253). The officer demonstrated some confusion in his identification because he was not sure whether or not there were 4 or 5 people in the car.

"I never did really know if there was a fifth one in there or not. I don't know" (Tr. 271). "I know there was four, but the fifth one . . ." (Tr. 289).

In any event, when he moved to the rear of the car to check the license ~~tags~~, Officer Sampson looked through the back seat window and noticed moneybags and coin wrappers in a brown box on the rear seat between the two men in the back (Tr. 254). He made an attempt to return to his scout car across the street to radio for assistance (Tr. 256). However, three men jumped out of the car with guns drawn and disarmed him (Tr. 257). At trial, Officer Sampson positively identified Adolph Barber and Wayne Hudson as two of the three men holding guns on him (Tr. 258, 259), but was unable to identify the third man (Tr. 290, 307, 308). As the three men slowly backed away from the police officer, several gun shots were fired and Sampson jumped behind his scout car (Tr. 260). The three men "started to run, south, up C Street. The automobile was starting to slowly go up the street also, more or less with them" (Tr. 261). Officer Sampson could not identify the person or persons who remained in the car or who drove it up the street after the shooting. "I knew the car was going, exactly who got back in or what, I'm not sure. I was a little bit flustered at the time" (Tr. 261).

"After they got up the street a ways, I got into the scout car, . . . I started after them up the street in the police

vehicle," continued the witness (Tr. 261, 262). Sampson followed the suspects' car and found it abandoned about one and a half blocks from the scene of the shooting (Tr. 262). The wallets of William H. Shelton, Leonard E. Shelton, and Adolph P. Barber were allegedly found on the front seat of this abandoned car (Tr. 383).

Shortly thereafter, foot patrolmen in the vicinity of C Street and Ridge Road, S. E., arrested: Wayne Hudson at 524 Ridge Road in an apartment of a woman whom he had convinced to let him use her telephone because of an emergency (Tr. 319); William Shelton in the bathroom of his girlfriend's apartment at 3925 C Street (Tr. 264); Appellant Leonard Shelton on the second floor hallway at 332 Ridge Road (Tr. 332, 347). Several hours later Adolph Barber phoned the police and gave himself up voluntarily in his sister's home at 3913 C Street (Tr. 569).

Appellant took the stand on his own behalf (Tr. 575). He testified that he slept at home that night and got up at 7:00 a.m. on March 7, 1966, and that he caught the Ridge Road bus about 7:30 a.m. (Tr. 576, 660) in order to go over to his brother's girlfriend's house at 3925 C Street, S. E., where his brother was supposed to have slept that night (Tr. 576). Appellant testified that when he got off the bus he saw eight or ten policemen walking towards him with drawn guns (Tr. 579). He walked into 332 Ridge Road and stood on the hallway landing

where the police arrested him several minutes later (Tr. 580). The police searched appellant and found no weapon or other incriminating evidence whatsoever on him (Tr. 581).

Furthermore, appellant Shelton testified that he did not own the car involved in the robbery or assault. The only car registered in his name was a blue 1950 Ford, inoperable for lack of repairs (Tr. 577).

Because the trial concerned itself in a large measure with the robbery and assault, neither the appellant nor his counsel took a very active part. However, appellant was subjected to all the evidence introduced against the other defendants and to several prejudicial occurrences.

During the course of the trial, two of the four defendants, Adolph Barber and Wayne Hudson, acted up in the courtroom, both in and out of the presence of the jury, in such a fashion as to prejudice the rights of the other co-defendants to a fair and impartial trial. The opening pages of the record show both defendants Barber and Hudson in a loud, boisterous, disrespectful manner, making motions for dismissal of their court appointed counsel (Tr. 20, 21, 22, 23). When these outbursts first occurred, both Mr. Lipshultz, attorney for William H. Shelton, and Mr. Williams, attorney for appellant Leonard E. Shelton, approached the bench and Mr. Lipshultz made the following motion:

MR. LIPSHULTZ: First of all, your Honor, because of the disturbances I don't think this jury panel is going to be a panel that can give my client, William Shelton, a fair trial. These are four individuals, each charged together, . . . Your Honor, I would like to make a motion for severance. I would have made this motion before if I thought it was prejudicial to William Shelton, but now I find if he continues in a trial with two of the individuals who made outbursts here, it would be to his disadvantage and to his prejudice . . . Under Rule 14, . . . the Court has a duty to grant a severance if prejudice develops at the trial. Here we saw the prejudice develop very early. I think my client will be prejudiced if he continues to remain at a trial with the other defendants.

THE COURT: I deny your motion.

(Tr. 23, 24, 25)

In view of the Court's stated decision on severance, appellant's attorney did not repeat a similar motion for severance on behalf of appellant.

Thereafter, as the trial proceeded, defendant Hudson continued his unruly and shocking behavior. At the opening of the trial, immediately after the jury was impaneled, the following occurred:

THE COURT: Two of the Marshals will go to the cell block and bring Mr. Wayne T. Hudson out forcibly. He refused to come to the courtroom. If you need any more Marshals, get them . . . Subdue him and put handcuffs and leg irons on him. Take his crutches away from him and carry him out.

Mr. Hudson, this trial is going to be conducted in an orderly fashion. If in order to do that it is necessary . . .

DEF'T. HUDSON: Your Honor, I don't . . .

THE COURT: You just be quiet and sit down. If in order to do that it is necessary to handcuff you, put leg irons on you and a gag, it will be done. Now, I don't want to have any more problem out of you.

DEF'T. HUDSON: I'd like to have the case moved out of your court. I feel I cannot receive a fair trial behind the statements you made that you will not allow whatever you allow, a mistrial in your courtroom. Since you are showing prejudice against me, and you are denying me due process of law, this is all charged with me . . .

(Tr. 56, 57)

(AT THE BENCH)

THE COURT: First, I want to put in the record what occurred, part of which the reporter probably has and part of which he doesn't, at the opening of trial this afternoon.

It was reported to the Court that Defendant Wayne T. Hudson refused to come out of the cell block. Later, it was reported to the Court that Hudson was using a crutch to hold the Marshals off.

Thereupon, I sent for reinforcements and told them to put leg irons and handcuffs on him and bring him in . . . I spoke to Mr. Hudson as appears in the record.

I will permit Mr. Hudson to have his crutches when we recess, and he may keep them as long as we have no further problem with him. If he gives us any further problem or attacks any other Marshal with them, we will take them away from him for good.

(Tr. 59, 70)

At various other times the outrageous conduct of defendant Hudson prevented the other defendants' counsel from

properly performing their duties in the courtroom. For example, Mr. Williams in the course of his crucial cross-examination of the most important Government witness, Officer Sampson, was suddenly interrupted:

THE COURT: Just a moment . . . Mr. Hudson

DEF'T. HUDSON: Yes.

THE COURT: You will please be quiet. Now, Mr. Williams, would you repeat your question?

(Tr. 304)

Once again, Mr. Williams was interrupted during his cross-examination, when the other defense counsel approached the Bench to complain vigorously regarding Hudson's conduct:

MR. DWYER: Your Honor, I wish you would tell that defendant [Hudson] to keep his mouth shut. While you have been talking up here, he has been talking out loud to his counsel.

MR. AVANCENA: He has been threatening, Your Honor, and I have had enough abuse.

THE COURT: All right, gentlemen. Go back to your seats.

(IN OPEN COURT)

THE COURT: Mr. Dwyer, I will have to take care of what I observe.

(Tr. 313)

The most flagrant instance of Mr. Hudson's prejudicial behavior and disrespect for the Court occurred midway in the trial:

(IN OPEN COURT)

THE COURT: Mr. Hudson, please be quiet.

DEF'T. HUDSON: What you want? You keep calling me.
What you want.

THE COURT: Just a moment.

The jury will please retire to the jury
room.

(JURY EXCLUDED)

THE COURT: Now, Mr. Hudson, your actions --

DEF'T. HUDSON: May I come forward?

THE COURT: No, I can hear you from right there.

Your actions at the counsel table in constantly heckling your own counsel, talking with other counsel in a loud and boisterous fashion, and with unhappy facial gestures, can only tend to prejudice your case.

DEF'T. HUDSON: Your Honor, from the start I told you I didn't want this man representing me.

THE COURT: And from the start I told you he's going to represent you.

DEF'T HUDSON: You denied my motion that I made orally to dismiss this man.

THE COURT: Yes, I have. And I am going to continue to deny it.

DEF'T. HUDSON: For what reason?

THE COURT: Because I think he is properly representing you.

DEF'T. HUDSON: Well, I don't your Honor.

THE COURT: I know, but what is important is I do, and you didn't ask to dismiss him until this trial started, and that is too late.

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DEF T. HUDSON: You won't grant nothing, that's what you're telling me. You don't care nothing about what happens to me. You go home every day. My life never is that stable.

THE COURT: I want to see that you get a fair and proper trial.

DEF'T. HUDSON: How can I get a fair and proper trial when you deny my motions?

THE COURT: Because your motions are improper.

DEF'T. HUDSON: What do you suggest I do?

THE COURT: I suggest you sit there and be quiet.

DEF'T. HUDSON: You talk like a damn moron.

THE COURT: I told you before --

DEF'T. HUDSON: Man, I don't care what you told me before.

THE COURT: I can use any necessary force to keep you quiet. I can put handcuffs on you, leg irons on you, and a gag.

Now, choose for yourself whether you are going to sit there and behave yourself, just be quiet, or whether you want to sit there with manacles on and a gag.

DEF'T. HUDSON: It's irrelevant to me, Your Honor.

You're doing everything else you want to do. Why don't you use your own discretion.

THE COURT: I will, the next time I have an outburst from you.

You can now tell me from there, Mr. Lipschultz, what you had in mind.

MR. LIPSHULTZ: Your Honor, sitting at counsel table I hear all the remarks. Maybe some are clouded from you.

I think the jury has such a good observation of Mr. Hudson, I didn't want to interfere with the direct examination of Mr. Treanor, but I think the remarks do carry.

Mr. Treanor was conducting an examination of the witness testifying, and Mr. Hudson had occasion to use very strong language. I actually feel that the jury hears the language.

MR. DWYER: I know well they hear it. That is what I am objecting to.

MR. LIPSHULTZ: I didn't want to object at the time.

I really feel, and I made a motion at the beginning of the trial -- I thought something was going to be wild and wooly by Mr. Hudson, and it is wild and wooly from my standpoint of trying to conduct a trial.

THE COURT: It isn't going to be wild and wooly any more.

MR. LIPSHULTZ: The last remarks were very harsh remarks.

THE COURT: Bring the jury back in.

MR. LIPSHULTZ: Just for the record, are you denying my motion for mistrial or severance?

THE COURT: Yes, I do.

[Emphasis added] (Tr. 326-330)

It is quite clear from the above record that the misconduct of defendants Adolph Barber and, in particular, Wayne Hudson seriously prejudiced the rights of appellant Leonard Shelton to a fair and impartial trial. Certainly defendant Hudson's frequent and repeated outbursts of wilful contempt of court and counsel must necessarily have infected the minds of the jury to the prejudice and detriment of appellant.

Judge Hart sentenced the appellant pursuant to the provisions of the Federal Youth Corrections Act, Title 18, U.S.C. § 5010(b). His appeal to this Court was allowed at Government expense.

STATEMENT OF POINTS

Three principal points are presented on appeal:

1. The trial judge erred in not directing a verdict of acquittal at the close of the government's case in view of the total absence of any incriminating evidence identifying appellant as one of the participants in the crime.

2. It was error for the Trial Court to try appellant on three counts before the same jury, after the Trial Court had heard Government's evidence which failed to establish that appellant was present or participated in any way in the robbery and assault on the store owner with a dangerous weapon since these crimes were separate and distinct felonies and there was a substantial chance this jury would erroneously conclude that the three charges were corroborative of one another.

3. It was error, affecting substantial rights of appellant Leonard Shelton, for the Trial Court to permit the same jury to decide the charges against appellant after the Trial Court had heard abundant evidence that Wayne Hudson participated in the crimes charged in all four counts against him, and that he was guilty of very inflammatory conduct in the

presence of both court and jury since it was likely this jury would be prejudiced against all the defendants by reason of their reaction to the misconduct of Wayne Hudson.

SUMMARY OF ARGUMENT

Appellant Leonard Shelton was indicted on three counts:

1. Robbery; 2. Assault on the store owner with a dangerous weapon;
3. Assault on a member of the police force with a deadly weapon.

Appellant was found not guilty on Counts 1 and 2, but was convicted of Count 3. The only evidence introduced against appellant was Officer Sampson's testimony identifying him as a passenger in the back seat of the stopped white 1958 Chevrolet. The police officer positively identified Adolph Barber and Wayne Hudson as two of the three men who jumped out of this car with guns drawn, but was unable to identify the third man. Appellant took the stand and testified that he did not commit any of these alleged crimes, and that on March 7, 1966, he was never in any car at Burns and C Streets, S. E. Therefore, the evidence was in direct conflict that appellant was even present at the scene of the shooting. Absolutely no evidence was introduced by the prosecution that appellant participated in any way in the shooting. Nevertheless, the jury found appellant guilty of assaulting Officer Sampson with a deadly weapon. Appellant's conviction was unwarranted because it was founded upon several prejudicial errors which occurred in the trial proceedings.

Firstly, when it became apparent at the close of the government's case that there was absolutely no evidence identifying appellant as one of the participants in the crime, the trial judge committed error in not directing a verdict of acquittal.

Secondly, appellant was charged with three counts, but the only evidence introduced against him pertained to Count 3. Nevertheless, appellant had to sit through a trial in which an abundance of evidence pertaining to all three crimes was introduced against the other three defendants. Therefore, it was reversible error to try appellant on three separate and distinct counts before the same jury since there was a substantial chance this jury would erroneously conclude that these three charges were corroborative of one another.

Thirdly, the inflammatory conduct of co-defendant Wayne Hudson in the presence of both court and jury was so outrageous that it created an atmosphere of prejudice which deprived appellant of his right to a fair and impartial trial. Therefore, it was error for the Trial Court to permit the same jury to decide the charges against appellant since it was likely that this jury would be prejudiced against all defendants by reason of their reaction to the misconduct of Wayne Hudson.

For these above reasons the jury's verdict resulted in a conviction of appellant that was unwarranted.

ARGUMENT

(With respect to Argument I below, appellant respectfully requests this Court to read the following pages of the reporter's transcript: Tr. 240-262 inclusive, 290, 307, 308, 575, 576, 577, 580, 581, 590.)

I

IN VIEW OF THE TOTAL ABSENCE OF ANY INCRIMINATING EVIDENCE IDENTIFYING APPELLANT AS ONE OF THE PARTICIPANTS IN THE CRIME, AND THE FAILURE OF THE PROSECUTION TO PROVE A PRIMA FACIE CASE AGAINST APPELLANT, THE TRIAL COURT ERRED IN NOT DIRECTING A VERDICT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE

The facts of this case place squarely before the Court the question whether the Trial Court erred in not directing a verdict of acquittal at the close of the government's case in view of the total absence of any incriminating evidence identifying appellant as one of the participants in the crime. Appellant Leonard Shelton was found not guilty of robbing the Food Plaza grocery store and not guilty of assault with a dangerous weapon therein. He was, however, convicted of assaulting a member of the police force with a deadly weapon. It is appellant's contention that, based on all the evidence produced at trial, the Court erred in not granting appellant's motion for a directed verdict of acquittal simply because the prosecution failed to prove a prima facie case against appellant.

In Curley v. United States, 31 U. S. App. D. C. 309, 392, 160 F.2d 229, 232 (1947), this Court set forth the following rule:

The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilty beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. [Emphasis added] (81 U. S. App. D. C. at 392)

Thus, in the District of Columbia, if reasonable men might or might not have a reasonable doubt as to guilt, the case may properly be submitted to the jury. Crawford v. U. S., ___ U. S. App. D. C. ___, 375 F.2d 512 (1967), affirming the Curley opinion. However, in Curley, this Court stated one objective standard for the trial judge to follow in deciding not to submit a case to the jury:

The critical point in this boundary is the existence or non-existence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal because no other result is permissible within the fixed bounds of jury consideration. [Emphasis added] (31 U. S. App. D. C. at 392)

No evidence was introduced to establish that appellant was present at the grocery store or participated in the robbery in any way. The prosecution, however, did introduce evidence that could be taken to establish that several minutes after

the holdup, Officer William L. Sampson stopped a white 1958 Chevrolet at the corner of Burns and C Streets, S. E., for running a stop sign -- approximately 4 blocks from the Food Plaza (Tr. 240, 241, 245). Officer Sampson identified appellant as the passenger sitting directly behind the driver of this vehicle in the back seat (Tr. 252), and further testified that appellant handed him a registration card (Tr. 251, 253). The officer demonstrated some confusion in his identification of the occupants because he glanced at appellant only momentarily as he was handed the registration card through the window and because he was not sure whether or not there were 4 or 5 people in the car. "I never did really know if there was a fifth one in there or not. I don't know" (Tr. 271).

Officer Sampson testified that three men suddenly jumped out of the car with guns drawn, disarmed him (Tr. 257), and moments later, began shooting at him as they fled the scene (Tr. 260). The officer positively identified Adolph Barber and Wayne Hudson as two of the three men holding guns on him (Tr. 258, 259), but was unable to identify the third man (Tr. 290, 307, 308). Nor could Officer Sampson identify the person or persons who remained in the car or who drove it up the street after the shooting. "I knew the car was going, exactly who got back in or what, I'm not sure. I was a little bit flustered at the time" (Tr. 261).

Appellant waived his constitutional rights and took the stand to testify on his own behalf (Tr. 575). He testified that he slept at home that night and got up at 7:00 a.m. on March 7, 1966, and that he caught the Ridge Road bus about 7:30 a.m. (Tr. 576, 660) in order to go over to his brother's girlfriend's house at 3925 C Street, S. E., where his brother was supposed to have slept that night (Tr. 576). Several minutes after getting off this bus, appellant was arrested on the hallway landing of 332 Ridge Road (Tr. 580). The police searched appellant and found no weapon or other incriminating evidence whatsoever on him (Tr. 581).

Furthermore, appellant testified that he did not own the car involved in the robbery or assault. The only car registered in his name was a blue 1958 Ford, inoperable for lack of repairs (Tr. 577). Appellant stated categorically that he did not commit any of these alleged crimes, and that on March 7, 1966, he was never in any car at Burns and C Streets, S. E., nor did he see anybody shooting at a police officer there (Tr. 598).

Appellant was found guilty of assaulting a member of the police force with a deadly weapon. Yet, there was conflicting evidence at trial that appellant was even present at the scene of the shooting. It is true that on a motion for a directed verdict, the judge must assume the truth of government's evidence

and give government the benefit of all legitimate inferences to be drawn therefrom. Crawford v. U. S., supra. Viewing the evidence in a light most favorable to government's position merely establishes at best appellant's presence in the back seat of the car driven by his brother, William Shelton. Officer Sampson's testimony establishes nothing more and there was no additional evidence to establish that appellant participated in the shooting in any way whatsoever. Therefore, the jury would have had to conclude that appellant Leonard Shelton by his presence in the car somehow aided and abetted the three other men in the commission of this crime. Yet, as the trial judge correctly instructed the jury:

Now, of course, in order that a person may be found guilty on the theory that he aided and abetted another or others in the commission of a crime, or that he acted jointly with others, he must have participated to some extent in the commission of the crime with the intention of so participating and with the knowledge of the crime that was about to be committed and in which he was participating.

The degree of participation may be ever so small, but there must be some active participation.
[Emphasis added] (Tr. 713)

Here, there is absolutely no evidence that appellant participated even slightly or that he knowingly associated himself in some way with the criminal venture. Nye & Niessen v. U. S., 336 U. S. 613, 69 S. Ct. 766 (1949); Long v. U. S., 124 U. S. App. D. C. 14, 360 F.2d 289 (1966). Evidence of active participation,

which is essential for guilt, must be clear, not equivocal or speculative. Therefore, the trial judge should have granted appellant's motion for a directed verdict of acquittal because "the judge must not allow the jury to speculate guilt without evidence or to stray into pure surmise, bias, or prejudice." Cooper v. U. S., 94 U. S. App. D. C. 343, 345, 218 F.2d 39, 41 (1954).

The very recent case of Cooper v. U. S., 125 U. S. App. D. C. 83, 357 F.2d 274 (1966), presents facts strikingly similar to our case. In Cooper, three appellants were tried together and convicted of robbery. There was ample evidence that about 8:00 in the evening of November 10, 1964, someone violently knocked down one Hill and robbed him while he was unconscious. Hill "couldn't say definitely" whether he was attacked by one, two or three people, but thought he was attacked by "approximately three people that were together seemingly." No other eye witness testified. This Court reversed the conviction of appellant Cooper on the grounds that trial court's instruction that if jury was convinced by identification it could find defendant guilty was erroneous, since even if the defendant's presence at the robbery scene was shown, issue of participation remained. Chief Judge Bazelon stated in his opinion at page 86:

Thus, when the trial judge told the jury that they could convict Cooper on Hill's identification, clarity and fairness to appellant required the judge to point out that identification would establish Cooper's presence only, and that conviction would also require a belief that he joined in the robbery or aided in its commission.

Therefore, the Cooper case establishes that evidence of mere presence at the scene of the crime without any additional evidence of some participation in the crime is not sufficient for conviction.

Certainly there was conflicting evidence at trial. Officer Sampson testified that appellant was seated in the back seat of the car he stopped at the corner of Burns and C Streets, S. E. Appellant testified that he was not present at the scene of the shooting. Sampson's identification, if believed, only served to place appellant at the scene of the crime. Furthermore, appellant in no way conceded that, if the jury believed he was present, his participation in the crime was established. Byrd v. U. S., 119 U. S. App. D. C. 360, 542 F.2d 939 (1965). On the contrary, appellant vigorously denied any participation or that he was even present, and the prosecution failed to produce any evidence establishing appellant as one of the participants in the crime.

Again, in Goodwin v. U. S., 121 U. S. App. D. C. 9, 347 F.2d 793 (1965), this Court strongly supported appellant's contention that there was insufficient evidence to convict and a

verdict of acquittal should have been directed. In Goodwin, four men were tried and found guilty of housebreaking, robbery and carrying a dangerous weapon. One defendant, Paul Vaughn, was not shown to have been in the store during the robbery or in the automobile at the time it apparently was awaiting the three active robbers. Although the officer who saw the car speeding away within minutes after the crime said it contained four colored males, he did not attempt to identify any of them. Defendant Vaughn testified and denied any participation in the crime. After some hesitation, the trial judge decided to submit the case to the jury on the idea that, being in the car when the officer stopped it, Vaughn was in possession of the recently stolen articles found therein.

On appeal, this Court reversed Vaughn's conviction and held that one defendant's presence in the automobile in which stolen articles were found when arrests were made was insufficient to show he was in possession of the stolen articles, and evidence of such presence and that he was present with the properly convicted defendants about an hour after the robbery in another part of the city, in the same automobile which had been seen speeding from a point near the scene of the robbery, was insufficient to connect such defendant with the robbery. The Court reasoned:

It is true that about an hour after the robbery in another part of the city, Paul Vaughn was with the other three appellants in the same automobile the other officer had seen speeding away from a point near the scene of the crime. But, in view of his denial of guilt, that was not enough to justify the conclusion beyond a reasonable doubt that he had been the lookout man. Nor was Paul's presence in the car at the time of arrest sufficient, we think, to show that he was in possession of the recently stolen articles herein involved. As to him, the judgment must be set aside. Goodwin v. U. S., supra at 11.

Appellant contends that in view of the conflicting evidence at trial, a reasonable juror could hardly avoid a reasonable doubt that he was present at the time of the crime, and could not avoid a reasonable doubt that he took part in the crime since no evidence to establish his participation was introduced at all. Remember the objective standard as stated in the Curley case, "if the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal." The facts of appellant's case fall squarely within the Curley standard in that reasonable jurymen hearing all the evidence in this case must necessarily have had a reasonable doubt as to appellant Shelton's participation in this crime; and, therefore, the trial court did err in not directing a verdict of acquittal at the close of the government's case.

(With respect to Argument II below appellant respectfully requests this Court to read the following pages of the reporter's transcript: TR. 95, 98, 151, 189, 214, 258, 259, 260, 716-719 inclusive)

II

WHEN IT APPEARED THAT THERE WAS NO EVIDENCE THAT APPELLANT PARTICIPATED IN THE ROBBERY OR ASSAULT ON THE STORE OWNER WITH A DANGEROUS WEAPON AND THAT THESE CRIMES WERE SEPARATE AND DISTINCT FELONIES, IT WAS ERROR TO TRY APPELLANT ON THREE COUNTS BEFORE THE SAME JURY SINCE THERE WAS A SUBSTANTIAL CHANCE THAT THIS JURY WOULD ERRONEOUSLY CONCLUDE THAT THE THREE CHARGES WERE CORROBORATIVE OF ONE ANOTHER

Appellant contends that the judgment should be reversed because of prejudice resulting from maintaining joinder of the three offenses for trial. Rule 8(a) of the Federal Rules of Criminal Procedure permits the government to join separate offenses for trial only when they are:

. . . of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting part of a common scheme or plan.

And under Rule 14, Federal Rules of Criminal Procedure, a severance of otherwise permissibly joined counts is to be granted when:

. . . it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. [Emphasis added]

Thus, even though the joinder may be permissible under Rule 8(a), if the defendant shows prejudice the court should either order an election by the government or grant separate trials. Failure to grant separate trials when the record indicates sufficient possibility of prejudice by reason of such joinder of offenses constitutes reversible error. This proposition has been clearly articulated in Dunaway v. U. S., 92 U. S. App. D. C. 299, 300, 205 F.2d 23, 24 (1953); Peckham v. U. S., 91 U. S. App. D. C. 136, 140, 210 F.2d 693, 697-698 (1953) and Chambers v. U. S., 112 U. S. App. D. C. 240, 301 F.2d 564 (1962).

As this Court said over fifty years ago:

It is doubtful whether separate and distinct felonies involving different parties, not arising out of the same transaction or dependent upon the same proof, should ever be consolidated. But it should not be permitted where the crimes charged are of such a nature that the jury might regard one as corroborative of the other, when, in fact, no corroboration exists. [Emphasis added] Kidwell v. U. S., 38 App. D. C. 566, 570 (1912).

A recent expression on the question of joinder of defenses is contained in the leading case of Drew v. U. S., 118 U. S. App. D. C. 11, 311 F.2d 85 (1964), where it was held that charges of robbery and attempted robbery of two High's Ice Cream Stores two and one-half weeks apart should have been severed. In reversing the convictions for failure to grant severance, this Court in Drew reasoned that where evidence of more than one crime

is offered to the jury because more than one crime is charged in the indictment, the evidence as to all crimes charged tends to cumulate to prove it, thus prejudicing the defendant in his right to a separate consideration of his guilt or innocence on each charge. How far the Court has gone toward the position it had suggested over half a century ago in Kidwell is indicated in one commentator's analysis of its Drew opinion:

In deciding that a severance was required under the particular facts in Drew, the District of Columbia Circuit, though disclaiming any such intention, made a persuasive argument for generally barring joinder of similar offenses, except perhaps where they would be independently admissible as prior similar acts. 8 Moore's Federal Practice -- Cipes Criminal Rules, ¶ 8.05(2).

The Court of Appeals in Drew set forth specific standards to be used in the District of Columbia to determine whether or not a defendant is prejudiced by such joinder of several offenses:

The justification for a liberal rule on joinder of offenses appears to be the economy of a single trial. The argument against joinder is that the defendant may be prejudiced for one or more of the following reasons: (1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. 118 U. S. App. D. C. at 14.

In this case there was no evidence introduced to establish that appellant was present at the grocery store or that he participated in any way in the robbery or assault with a deadly weapon on the store co-owner therein. However, the prosecution did introduce evidence that could be taken to establish that the other three men, Wayne T. Hudson, William H. Shelton and Adolph Barber entered Food Plaza, Inc., on 441 Chaplin Street, S. E., and at gunpoint, robbed the co-owner of the store of about \$2,700 and fled. Specifically, those three defendants were identified by several customers (Tr. 189, 214), an employee (Tr. 95, 96), and the store manager (Tr. 151) as the men who entered the grocery store and forcefully emptied several cash registers and one safe. Furthermore, at trial, Officer William H. Sampson positively identified Adolph Barber and Wayne Hudson as two of the three men holding guns on him (Tr. 258, 259) and moments later firing shots at him (Tr. 260). Yet, throughout the entire trial, the prosecution produced no evidence to establish the appellant's participation in any of the three felonies charged in his indictment. In fact, appellant was found not guilty of Counts 1 and 2, but was found guilty of Count 3, assaulting a member of the police force with a deadly weapon. The jury found the other defendants, Hudson, Shelton and Barber, guilty on all counts as charged.

Appellant contends that he would not have been convicted had the jury not concluded that "where there is smoke there must be fire." All the evidence introduced, with respect to the grocery store robbery, pertained to the other three defendants, yet this evidence may well have infected the minds of this jury to appellant's detriment and prejudice.

There was absolutely no evidence upon which to find appellant guilty of Counts 1 and 2 and at best, very weak evidence to prove appellant guilty of Count 3. The prosecution charged appellant with all three offenses and therefore required the jury to consider his innocence or guilt. The jury in confusion and in the spirit of compromise may have found appellant guilty of Count 3 and then salved its conscience by acquitting him of Counts 1 and 2. If this result was obtained, not because of evidence, but because of the cumulative effect of three charges it should never be permitted to stand. In U. S. v. Lotsch, 102 F.2d 35 (2d Cir.), cert. den. 307 U. S. 622 (1949), Judge Learned Hand said:

There is indeed always a danger when several crimes are charged together that the jury may use the evidence cumulatively. That is, that, although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt the sum of it will convince them as to all. This possibility violates the doctrine that only direct evidence of the transaction charged will ordinarily be accepted and that the accused is not to be convicted because of his criminal disposition. [Emphasis added] 102 F.2d at 36.

Moreover, prejudice from joinder lies in the possibility that evidence of one offense may be taken by the jury to supply deficiencies in the direct proof of the other offense and in the tendency of the defendant's "being held out to be habitually criminal" (see McElroy v. U. S., 164 U. S. 76, 79 (1896)) and the hostility thus generated.

A less tangible but perhaps equally persuasive element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinguished from only one. Drew v. U. S., supra at 14.

This Court in Gregory v. U. S., ___ U. S. App. D. C. ___, 169 F.2d 185 (1966), recently extended the holding of Drew on the question of prejudicial joinder of offenses stating at page 189:

It may be seriously questioned whether it is proper in any capital case to join for trial offenses occurring at different times and places. The danger arising from the cumulative effect of evidence of other offenses on the minds of the jurors is too great to tolerate in such cases.

In Gregory, the indictment against the appellant charged five counts -- first degree murder, second degree murder, two robberies and one assault with a dangerous weapon. After his motion for severance was denied, appellant was tried and convicted on all counts. The Court of Appeals reversed for severance and granted a new trial:

Here there was not only the danger of the evidence with respect to the two robberies cumulating in the

jurors' minds tending to prove the defendant guilty of each but the evidence as to one of the robberies was so weak as to lead one to question its sufficiency to go to the jury. Thus its primary usefulness in this trial was to support the government's case as to the robbery which resulted in the murder. 369 F.2d 129.

Similarly, appellant herein contends that the evidence with respect to his participation in the robbery was so weak as to lead one to question the propriety of jury consideration. Further, its primary usefulness in this trial insofar as appellant is concerned was to support the government's case as to the second occurrence, i.e., the policeman stopping the car, which resulted in the crime of assaulting a police officer with a deadly weapon.

Even the trial judge committed the error of cumulating the evidence of the various crimes charged to the prejudice of appellant. He stated in his charge to the jury:

Now in Count 3 which is the assault on the police officer there is no identification that either Leonard E. Shelton or William H. Shelton fired any gun at the officer. But there again, if you find that the two Sheltons were connected with the robbery itself, and that this assault took place as a part of the escape or fleeing from the robbery then even though Leonard E. Shelton or William H. Shelton or neither of them actually fired a shot they would still be guilty on aiding and abetting. [Emphasis added] (Tr. 716, 717)

Thus, the judge mistakenly accumulated any evidence of the robbery with any evidence of appellant's guilt as to Count 3, charging that if either Shelton brother were connected with the robbery itself then both would be guilty of assaulting a

policeman with a deadly weapon under the aiding and abetting statute. In other words, the trial judge regarded any evidence of the robbery, whether incriminating either William H. Shelton or Leonard Shelton or both, as corroborative of the other crime of assaulting a police officer with a deadly weapon when, in fact, no such corroboration existed. This slip of the tongue was prejudicial error and further mislead the jury, for, in fact, appellant was not found guilty of any involvement in the robbery yet guilty of shooting at the police officer. But, as our Court of Appeals warned in Drew:

If separate crimes are to be tried together -- and we are not to be understood as intimating any conclusion that this can never as a practical matter be successfully undertaken -- both court and counsel must recognize that they are assuming a difficult task, the performance of which calls for a vigilant precision in speech and action far beyond that required in the ordinary trial. 110 U. S. App. D. C. 20.

The question of weighing prejudice to the defendant caused by the joinder against the obviously important considerations of economy and expedition in judicial administration has been considered many times by the federal courts and state courts and the courts of England. In Queen v. King, 1 Q.B. 214, 216 (1897), Hawkins, J., said:

I pause here to express my decided opinion that it is a scandal that an accused person should be put to answer such an array of counts containing, as these do, several distinct charges. Though not

illegal, it is hardly fair to put a man upon his trial on such an indictment, for it is almost impossible that he should not be grievously prejudiced as regards each one of the charges by the evidence which is being given upon the others.

Appellant submits that a defendant is prejudiced by a joinder of offenses whenever the offenses are separate and distinct felonies, committed at different times, not provable by the same evidence, and where the offenses are such that they might lead the jury to consider they are corroborative of one another.

Furthermore, appellant maintains that the trial record indicates that (1) the jury used the evidence surrounding the robbery to infer criminal disposition on the part of the appellant upon which his guilt of shooting at a police officer was found; (2) the jury cumulated the evidence of the three offenses to find him guilty of Count 3; (3) prejudice and hostility were engendered in the minds of this jury by charging the appellant with several crimes as distinct from only one; and (4) the jury regarded the robbery and assault with a deadly weapon therein as corroborative of the other crime of assaulting a policeman with a deadly weapon when, in fact, no corroboration existed. Therefore, appellant falls squarely within the specific arguments against joinder of offenses as set out in the Drew and Kidwell cases, and a severance should have been granted for trial purposes.

(With respect to Argument III below, appellant respectfully requests the Court to read the following pages of the reporter's transcript: Tr. 20-25 inclusive, 56, 57, 69, 70, 304, 315, 326-330 inclusive.)

III

WHEN IT APPEARED THERE WAS ABUNDANT EVIDENCE THAT WAYNE HUDSON PARTICIPATED IN THE CRIMES CHARGED IN ALL FOUR COUNTS AGAINST HIM AND THAT HE WAS GUILTY OF INFLAMMATORY CONDUCT IN THE PRESENCE OF BOTH COURT AND JURY, IT WAS ERROR TO PERMIT THE SAME JURY TO DECIDE THE CHARGES AGAINST APPELLANT LEONARD SHELTON SINCE IT WAS LIKELY THAT THIS JURY WOULD BE PREJUDICED AGAINST ALL THE DEFENDANTS BY REASON OF THEIR REACTION TO THE MISCONDUCT OF WAYNE HUDSON

Appellant complains that the atmosphere of the trial below rendered impossible an objective and unprejudiced hearing to which he was entitled. Specifically, appellant contends that the outbursts and conduct of defendant Wayne Hudson so infected the minds of the jury with prejudice and hostility towards him that he was denied the fundamental fairness required by due process. The pertinent parts of the record, demonstrating Wayne Hudson's repeated outrageous conduct during the trial, appear in the Statement of the Case in this brief. But the particular acts of Hudson can be briefly summarized as follows:

1. Making motion for dismissal of his court appointed counsel in loud, disrespectful manner at the very opening of trial.
2. Hitting marshals with his crutches in the cell block and refusing to come out for trial.
3. Continuously interrupting

appellant's counsel in cross-examination of key government witnesses. 4. Threatening and heckling his own court appointed counsel in loud tones. 5. Repeatedly arguing with the Court in disrespectful manner, i.e., yelling at Judge, "You talk like a damn moron." 6. Swearing at government witnesses loudly enough for jury to hear. 7. Generally conducting himself in an inflammatory manner in wilful contempt of court and counsel.

Rule 14 of the Federal Rules of Criminal Procedure^{3/} provides for an exercise of direction by the trial judge as to whether, at any point in the trial, there appears to be a possibility of sufficient prejudice to any defendant to warrant a severance. Schaffer v. U. S., 362 U. S. 511 (1959); and the exercise of that discretion will be corrected only if abused. Dowling v. U. S., 249 F.2d 746 (1957); U. S. v. Haupt, 136 F.2d 661 (1943). The United States Court of Appeals for the Second Circuit has stated the obviously important considerations of economy and expedition in judicial administration as reasons for denying a severance:

3/ Rule 14 - Relief from Prejudicial Joinder:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever relief justice requires. [Emphasis added]

Manifestly it was not error to deny the mistrial motions. If such conduct by a co-defendant on trial were held to require a retrial it might never be possible to conclude a trial involving more than one defendant; it would provide an easy device for defendants to provoke mistrials whenever they might choose to do so. U. S. v. Bentvena, 319 F.2d 916, 931 (1963).

Appellant is very conscious of these valid policy considerations, but desires to raise this question to the Court: How do you protect the rights of one defendant (appellant) to a fair and impartial trial when the outrageous conduct of a co-defendant (Wayne Hudson) seriously prejudices the jury? The trial court must conduct its business in an atmosphere of dignity and decorum. Clearly, this was not the case here, for Hudson's antics and outbursts disrupted the proceedings in a way that must have irretrievably prejudiced appellant. More importantly, in cases of this kind, the record never preserves what were probably the most important factors of the offense; namely, the tone of voice and general appearance and bearing of Hudson. Why must appellant be penalized by the inflammatory conduct of co-defendant Hudson? Doesn't fairness require that if Hudson deliberately acts up to cause hostility in the minds of this jury, the trial judge should sever out appellant, while allowing Hudson's trial to continue to its conclusion?

In Wilson v. U. S., 344 F.2d 156, 157 (1965), this Court held that:

Any error in causing defendants, who had disrobed when the case was called for trial and caused difficulty with the marshal, to be wrapped in blankets and brought to the courtroom in handcuffs and leg irons was not ground for reversal where the evidence of guilt was clear and strong.

But the court went on to say at page 157:

Except that the evidence of guilt was very strong we would have some difficulty affirming; for though an accused may not be permitted to prevent his trial by obstructive tactics, the trial court is under an obligation to make a reasonable effort to obviate such conditions, even though they are created by the defendant's own conduct because of their tendency to prejudice the accused in the eyes of the jury.
[Emphasis added]

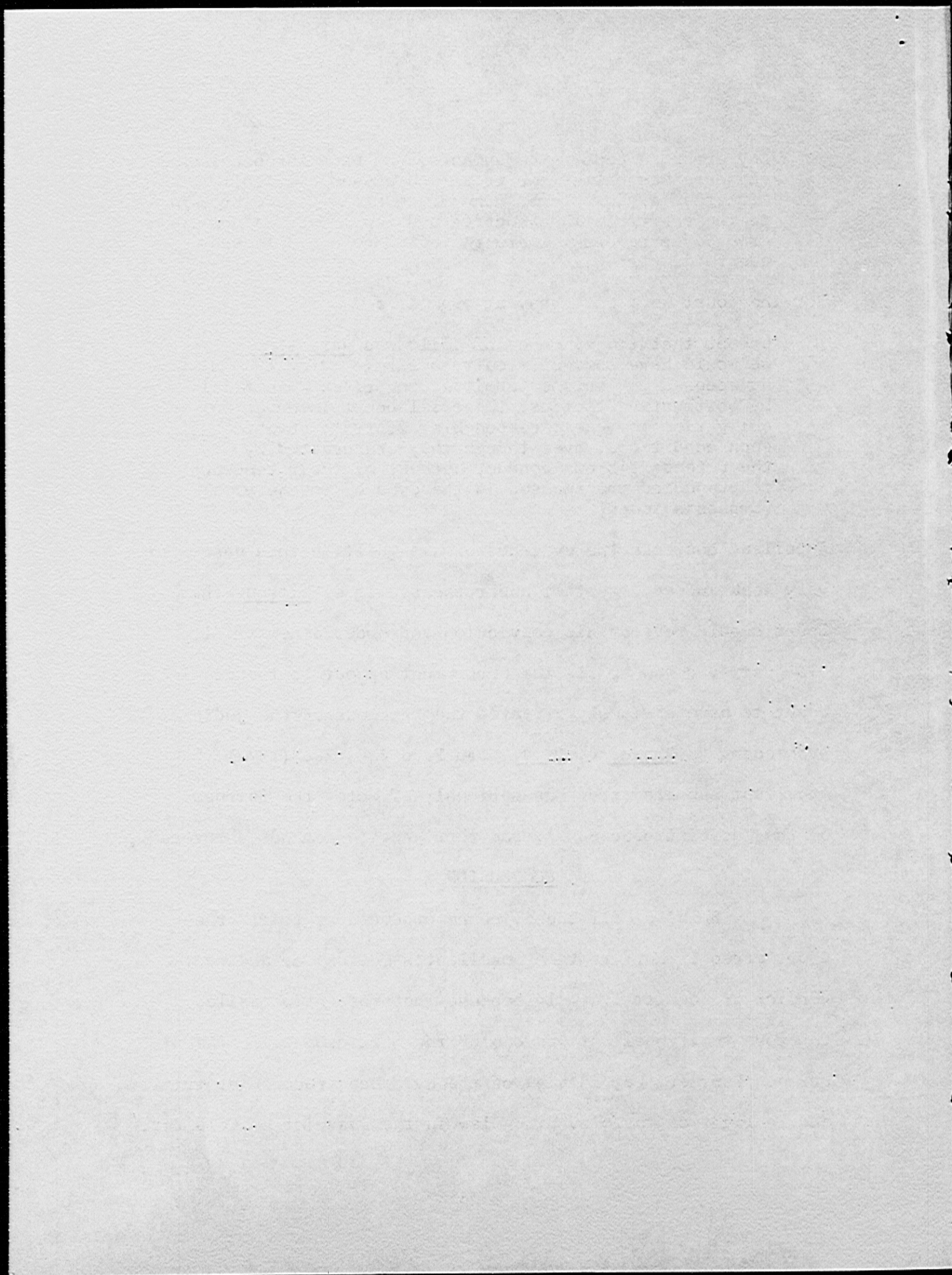
Appellant contends the evidence of his guilt in this case was very weak indeed, and that under the dictum of Wilson, this Court should reverse his conviction and order a new trial.

"To justify a new trial, the error must appear to the appellate court to have seriously affected the fairness of the judicial proceeding." Blaine v. U. S., 136 F.2d 284, 286 (1943).

Appellant submits error has seriously affected the fairness of the judicial proceeding, and that justice demands a reversal.

CONCLUSION

Based on all the evidence produced at trial, the Court erred in not granting appellant's motion for a directed verdict of acquittal simply because the prosecution failed to prove that appellant was one of the participants in the crime. Furthermore, in view of the evidence produced at trial and in light of the prevailing law in the District of Columbia,



it was prejudicial error not to grant appellant a severance of offenses. And finally, the trial record indicated a possibility of sufficient prejudice to appellant to warrant a severance of defendants, and the Trial Court's failure to do so was reversible error.

For the reasons stated above, it is urged that the judgment of conviction against appellant Leonard E. Shelton be reversed and remanded for a new trial.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,829

LEONARD E. SHELTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 20,830

WAYNE T. HUDSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 20,831

WILLIAM H. SHELTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 20,761

ADOLPH P. BARBER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia
~~United States Court of Appeals~~
for the District of Columbia Circuit

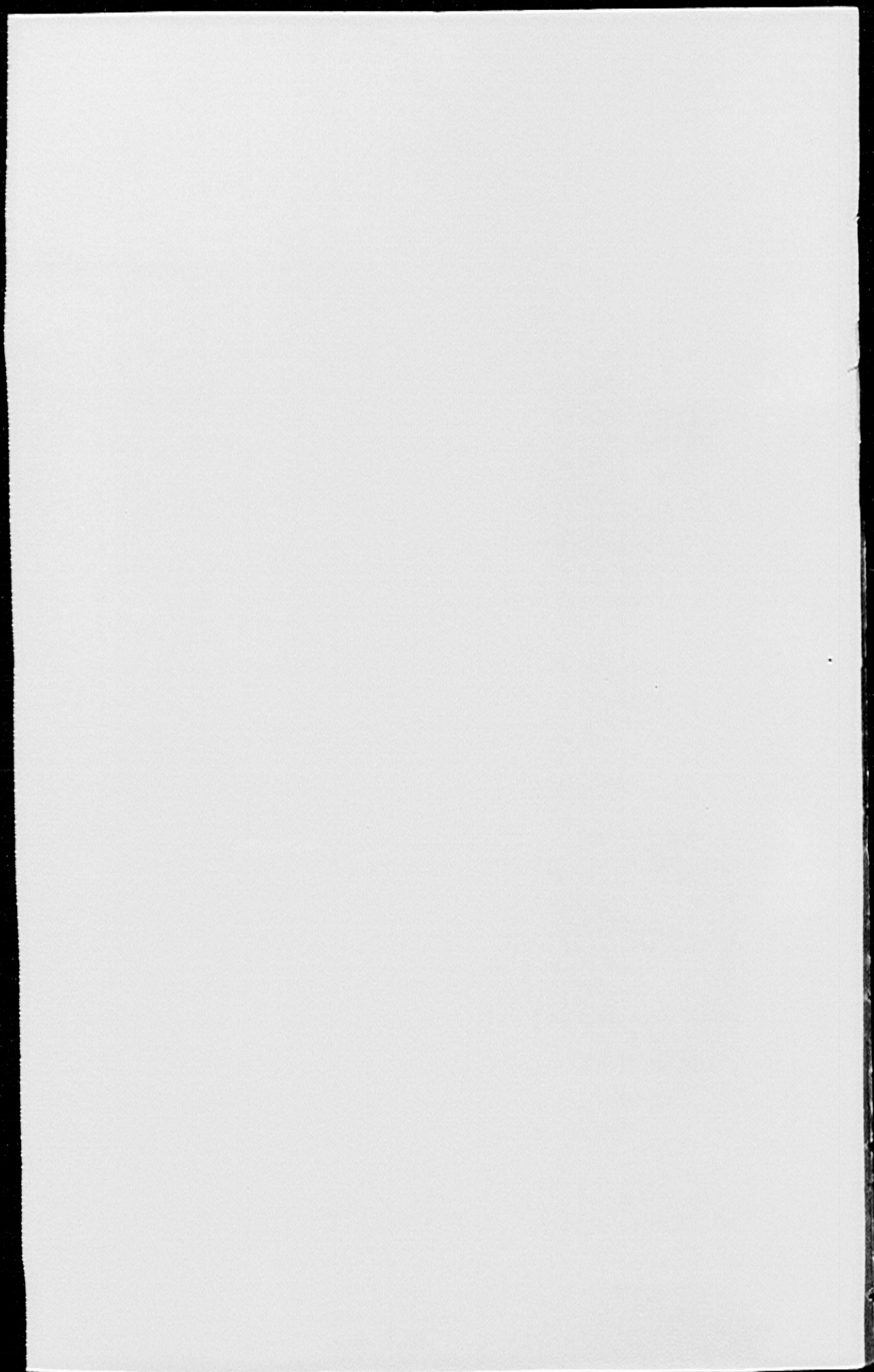
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Cr. No. 669-66



QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

I

May appellants challenge for the first time on appeal their pre-*Wade* and *Gilbert* out-of-court identifications by government witnesses on either right to counsel or due process grounds, where no objection was made to the admissibility of these witnesses' trial identifications on these or any other ground.

II

Was it an abuse of discretion for the trial judge to deny a motion for severance and/or mistrial on the ground that appellant Hudson's conduct in the presence of the jury did not prejudice the jury against his codefendants.

III

Whether appellant Leonard Shelton's motion for judgment of acquittal was properly denied where the evidence was such that reasonable men might or might not fairly find beyond a reasonable doubt that he was an aider and abettor in the crimes with which he was charged.

IV

Did the trial court's instruction on "identification" which used the term "involved", when considered in the context in which it was given and in conjunction with the charge to the jury as a whole, confuse or mislead the jury in its understanding of the government's burden of proof in establishing the requisite degree of "participation" to establish guilt as an aider and abettor.

(I)

II

V

Was it an abuse of the trial court's discretion to deny appellant Hudson's motion to dismiss his court-appointed attorney raised for the first time at the beginning and during the course of the trial, where it was obvious that this motion was part of a deliberate attempt by Hudson to disrupt and obstruct the course of his trial in order to prevent his conviction in view of the overwhelming evidence against him.

III

INDEX

	Page
Counterstatement of the Case	1
The Prosecution's Case	2
A. The Food Plaza Robbery	2
B. The Assault on Private Sampson	5
Appellants' Cases	10
Summary of Argument	12
Argument:	
I. Appellants may not attack, for the first time on appeal, their out-of-court identifications by government witnesses on either right to counsel or due process grounds	14
II. Appellant Hudson's conduct was not prejudicial to his co-defendants so as to render the trial court's denial of a mistrial and severance an abuse of discretion	20
III. There was ample evidence from which the jury could conclude beyond a reasonable doubt that appellant L. Shelton was guilty of the crimes charged	29
IV. The trial court's identification instruction, which included the term "involved," when viewed in its proper context and in conjunction with the charge as a whole could not have misled or confused the jury	35
V. The trial court did not abuse its discretion in denying appellant Hudson's motion to dismiss his court-appointed counsel	38
Conclusion	39

TABLE OF CASES

<i>(Jesse L.) Barnes v. United States</i> , No. 20,373, D.C. Cir., June 15, 1967	21, 26, 34
<i>Brown v. United States</i> , 105 U.S. App. D.C. 77, 264 F.2d 363 (<i>en banc</i>), cert. denied, 360 U.S. 911 (1959)	39
<i>Brown, Irby and Jones v. United States</i> , — U.S. App. D.C. —, 375 F.2d 310 (1966)	21, 27
* <i>Cooper v. United States</i> , 123 U.S. App. D.C. 83, 357 F.2d 274 (1966)	31, 33
* <i>Crawford v. United States</i> , — U.S. App. D.C. —, 375 F.2d 332 (1967)	29, 32
<i>Cunningham v. United States</i> , No. 19,648, D.C. Cir., June 23, 1967 (<i>aff'd per curiam</i>)	39

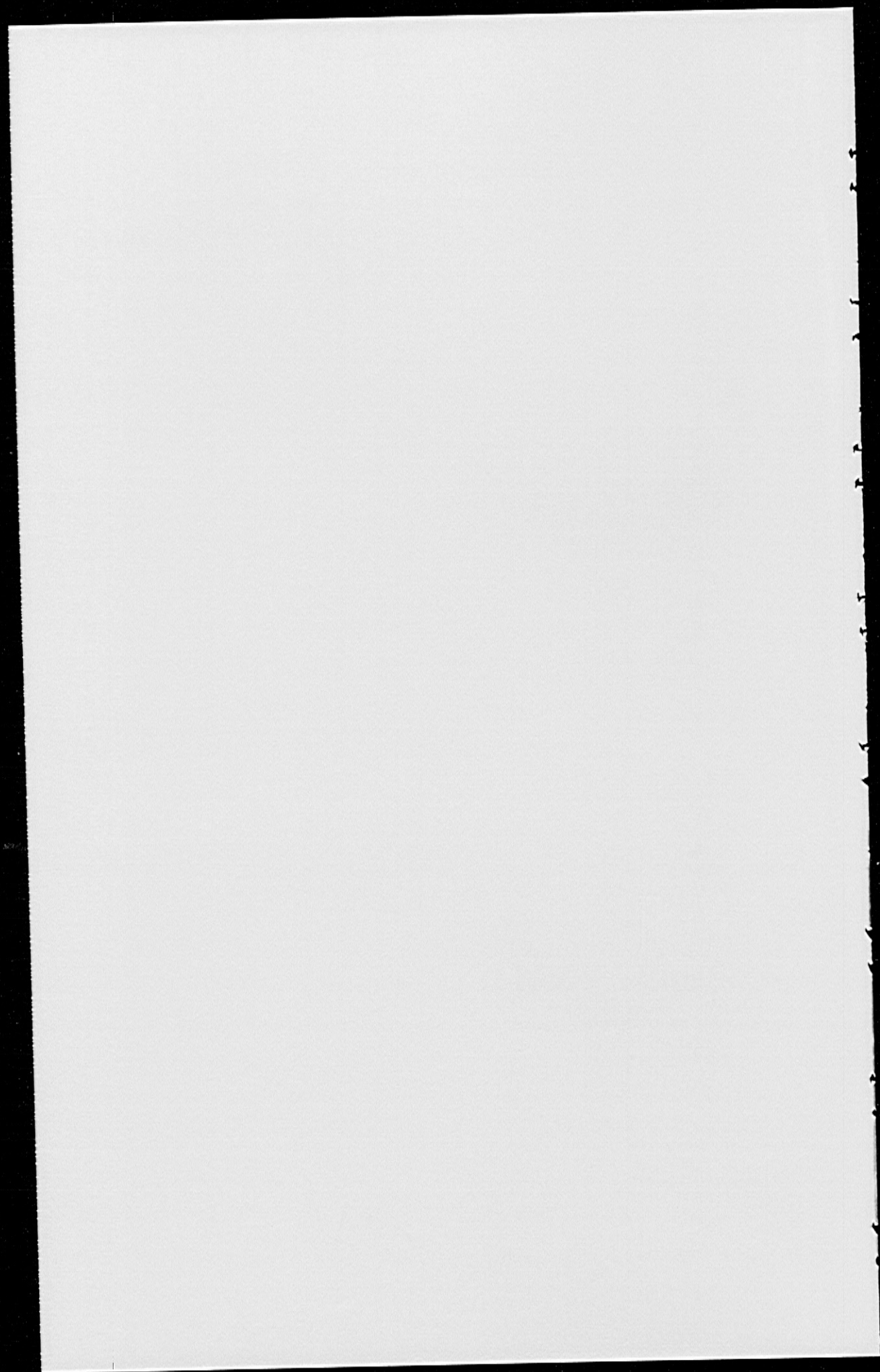
IV

Cases—Continued	Page
<i>Cupo v. United States</i> , 123 U.S. App. D.C. 324, 359 F.2d 990 (1966)	21
<i>Curley v. United States</i> , 81 U.S. App. D.C. 389, 160 F.2d 229, cert. denied, 331 U.S. 837 (1947)	30, 32
<i>Drew v. United States</i> , 118 U.S. App. D.C. 11, 331 F.2d 85 (1964)	34
* <i>Fuller v. United States</i> , No. 19,532, D.C. Cir., November 20, 1967	16
<i>Fulwood v. United States</i> , 125 U.S. App. D.C. 183, 369 F.2d 960 (1966)	24
* <i>Gilbert v. California</i> , 388 U.S. 263 (1967)	14
* <i>Goodwin v. United States</i> , 121 U.S. App. D.C. 9, 347 F.2d 793, cert. denied sub nom., <i>Vaughn v. United States</i> , 382 U.S. 855 (1965)	32
(<i>Jerry D.</i>) <i>Gray v. United States</i> , 123 U.S. App. D.C. 39, 356 F.2d 792 (1966)	34
(<i>Robert</i>) <i>Gray v. United States</i> , 114 U.S. App. D.C. 77, 311 F.2d 126 (1962), cert. denied, 374 U.S. 838 (1963)	16
<i>Gregory v. United States</i> , 125 U.S. App. D.C. 140, 369 F.2d 185 (1966)	34
<i>Johnson v. United States</i> , 110 U.S. App. D.C. 187, 290 F.2d 378 (1961)	16
*(<i>Robert S.</i>) <i>Jones v. United States</i> , 124 U.S. App. D.C. 83, 361 F.2d 537 (1966)	37
<i>Kennedy v. United States</i> , 122 U.S. App. D.C. 291, 353 F.2d 462 (1965)	16
<i>Monroe v. United States</i> , 98 U.S. App. D.C. 228, 234 F.2d 49, cert. denied, 352 U.S. 873 (1956)	25
<i>Moore v. United States</i> , 359 F.2d 852 (5th Cir. 1966)	29
<i>Murray v. United States</i> , No. 20,921, D.C. Cir., October 3, 1967 (aff'd per curiam)	39
<i>Rhone v. United States</i> , 125 U.S. App. D.C. 47, 365 F.2d 980 (1966)	20, 34
(<i>Reginald</i>) <i>Robinson v. United States</i> , No. 19,482, D.C. Cir., July 26, 1967	16
<i>Spencer v. Texas</i> , 385 U.S. 554 (1967)	25
* <i>Stovall v. Denno</i> , 388 U.S. 293 (1967)	12, 14, 16
* <i>United States v. Bentvena</i> , 319 F.2d 916 (2d Cir.), cert. denied sub nom., <i>Ormento v. United States</i> , 375 U.S. 940 (1963)	26, 39
* <i>United States v. Indiviglio</i> , 352 F.2d 276 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907 (1966)	16
* <i>United States v. Wade</i> , 388 U.S. 218 (1967)	14
* <i>Wilson v. United States</i> , 120 U.S. App. D.C. 72, 344 F.2d 166 (1965)	27
* <i>Wise v. United States</i> , No. 20,259, D.C. Cir., July 27, 1967	14

*Cases chiefly relied upon are marked by asterisks.

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	Page
18 U.S.C. § 5010(b)	2
Rule 8(a), Fed. R. Crim. P.	34
Rule 8(b), Fed. R. Crim. P.	20
Rule 14, Fed. R. Crim. P.	20, 34
Rule 52(b), Fed. R. Crim. P.	16



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,829

LEONARD E. SHELTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 20,830

WAYNE T. HUDSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 20,831

WILLIAM H. SHELTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 20,761

ADOLPH P. BARBER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

(1)

COUNTERSTATEMENT OF THE CASE

On May 16, 1966, appellants were all indicted on charges of robbery (holdup), assault with a dangerous weapon, that is, a pistol, and assault on a member of the police force with a dangerous weapon, that is, a pistol. In addition, appellant Hudson was indicted for carrying a dangerous weapon, that is, a pistol. (Criminal Case No. 669-66.) They were tried together by a jury on October 20, 24, 25, 27, November 1 and 3, 1966 before Judge George E. Hart. On November 4, the jury returned a special sealed verdict; Barber and William Shelton (hereinafter "W. Shelton") were found guilty of counts I, II, and III, as indicted; Hudson was convicted on all four counts as indicted; and Leonard Shelton (hereinafter "L. Shelton") was acquitted on Counts I and II and convicted on Count III, assault on a member of the police force with a pistol.

Appellants were sentenced to terms of imprisonment as follows: Barber and W. Shelton: two-six years each on Counts I and III, consecutively, and two-six years on Count II, concurrent with Counts I and III. L. Shelton: Indeterminate sentence under the Federal Youth Corrections Act, 18 U.S.C. § 5010(b). Hudson: consecutive sentences of three-nine years on Count I and two-six years on Count III, and two-six years on both Counts II and IV, to run concurrently with each other and with Counts I and III.

All four defendants have appealed and by order of this Court entered *sua sponte* on March 10, 1967, these appeals were consolidated for all purposes.

The Prosecution's Case

A. The Food Plaza Robbery

On the morning of March 7, 1966, Walter Jones, Jr., an assistant butcher at Food Plaza, Inc., a supermarket at 441 Chaplin Street, Southeast, was working in the meat department in the rear of that store (Tr. 88-89).

At approximately 8:55 a.m., a man Jones noticed had been looking in the back room door came up behind him and said, "Act natural, this is a hold-up" (Tr. 91). The man wore a green leather coat, black or blue hat, and light, almost orange, colored sunglasses (Tr. 92, 119). The sunglasses did not prevent Jones from taking note of the man's eyes, and Jones identified appellant Hudson as being this man (Tr. 94, 123).

Hudson placed a gun in Jones' side and pushed him into the meat room where they were met by two co-workers, Ann Herbert and Harry Bronfin (Tr. 91, 95). A second man wearing a black leather three-quarter length coat and a plaid cap entered the room with a black, long barreled and handled gun in his hand. Jones identified appellant Barber as this man. (Tr. 96-98, 104-05.) Hudson and Barber put Jones, Herbert and Bronfin in a small refrigerator room which was kept at thirty-two degree temperature and forced them to lie down on the floor. The holdup men left the refrigerator and twenty minutes later Jones and his co-workers were let out of the ice-box by another employee, Frank Rose. At one point, Hudson struck Bronfin in the face with his gun. (Tr. 98-101.)

Frank Rose had been operating a cash register on the morning of March 7, at the check-out counter nearest the office in the front of the Food Plaza where the safe was located (Tr. 141-43). At about 8:55 a.m., while waiting on the adult customers and numerous school children in the store at the time, Rose heard someone yell, "This is a hold-up" (Tr. 145-46). A man wearing a tan coat and gloves walked up to Rose, pointed a gun at him and ordered him to fill up a bag with the money from the cash register. The man then grabbed the bag with the money and ordered Rose to lie on the floor (Tr. 146-48). Rose identified appellant W. Shelton, on the basis of "his face and all, and his little mustache and his sunken cheekbones," as this man (Tr. 151, 170).

Rose lay on the floor awhile and could see Sidney Hudes, the store manager (Tr. 144), lying up front near

the safe and could hear the sound of money dropping coming from that direction (Tr. 149-50, 152-53). After a few minutes, on orders of the hold-up men, the employees and customers up front rushed to the back room, and it was there that Rose found the other employees in the ice box (Tr. 152-54).

One of the customers, Daisy Perry, identified appellant Hudson as the man who walked up to her at the dairy counter, put a gun in her side, and ordered her up front (Tr. 189-91). She said Hudson had on a green leather coat, a hat, and light colored sunglasses through which one could clearly see his eyes (Tr. 191, 206). She also saw someone pushing Sidney Hudes towards the safe (Tr. 197), and heard money falling on the floor near the safe (Tr. 202).

Andrew S. Duvall, another customer, entered the Food Plaza at about 8:55 (Tr. 209). While at the lunch meat counter, someone stuck a gun in his side and ordered him up front where he observed three additional men with guns and the cashiers and customers with their hands up (Tr. 210-13). None of the robbers wore masks (Tr. 225). One of the gunmen was wearing a green leather coat, a black hat and "had on tinted greenish yellowish glasses"; Duvall noted such features as this man's facial structure, height, and nose and identified him as being appellant Hudson (Tr. 214, 222). One of the gunmen ordered Frank Rose to empty the money from the register into a bag; one of the others pushed Sidney Hudes over to the safe with his gun and ordered Hudes to open it "damn quick" (Tr. 215-16). While lying on the floor, Duvall heard the safe being opened and money being put into a bag or box. He next heard one of the robbers say, "We should kill them all," and another reply, "No we'll give them a break." (Tr. 217.)

Following orders, Duvall got up and ran with the others to the rear of the store. There he heard someone whistle and the noise of a car in the front of the store which came from the direction of Texas Avenue, South-

east and went down the hill in the direction C Street, Southeast. (Tr. 217-18.)

Hester Ward, another customer, was similarly accosted by a gunman and forced to lie on the floor near the safe. She saw the robbers emptying the money from the safe and putting it into bags and also heard their discussion about whether to kill the witnesses. (Tr. 228-31, 236.)¹

B. The Assault on Private Sampson

Private William L. Sampson of No. 14 Precinct, was in uniform and assigned to a one-man scout car on the morning of Monday, March 7, 1966 (Tr. 239-40). At approximately 9:00 a.m., he was at the intersection of Burns and C Streets, Southeast, escorting school children across the intersection on their way to the school located at Texas and C Streets (Tr. 240, 245). C Street runs down hill from Texas into the intersection with Burns and the Fort Chaplin public housing area begins on one side of C Street after the intersection with Burns. The other three sides are wooded areas. The intersection is approximately four blocks from the Food Plaza at 441 Chaplin Street. (Tr. 240-41.)

As the officer was assisting a young girl across the street, a white '58 Chevy came down C Street towards them, failed to stop for a stop sign, and failed to slow down despite the fact the officer had his hand up signaling the car to stop. The car finally did stop only a few feet from the officer and the girl; Sampson got the girl safely to the sidewalk and told the driver to wait a minute. He went back to talk to him, explained his violation and asked to see his driver's permit and registration. (Tr. 245.) Sampson identified appellant W. Shelton as the driver (Tr. 248). While conversing with the driver, the officer noted there were definitely four people in the car (Tr. 307), two that he knew of in the front seat and

¹ Sidney Hudes, the victim named in Counts I and II of the indictment was deceased at the time of this trial.

two in the back seat. He was unable to see towards the door on the passenger side of this two-door vehicle to determine whether there was a third person in the front seat. (Tr. 247, 249, 251.)

The driver, William Shelton, handed the officer a driver's permit with his name on it (Tr. 249-50). Thereupon the passenger seated in the rear directly behind the driver handed the officer a registration card (Tr. 251-52). Sampson identified appellant Leonard Shelton as this man (Tr. 251). L. Shelton told the officer that the car was his and his brother was driving. His name was on the registration card given the officer as one of the owners of the vehicle. (Tr. 287, 304.) The officer proceeded to the rear of the car to check the registration card against the tag numbers. The tag number was 3 LZ 14, District of Columbia, and matched the registration for the '58 Chevy being driven by W. Shelton. (Tr. 252-53, 451.)

While at the rear of the auto, Sampson observed a brown cardboard box on the rear seat between L. Shelton and the other passenger seated there. The officer could see money bags, coin wrappers, United States currency and some loose change in the box. He proceeded to the front of the car and talked to the driver again. He observed another box with similar contents on the transmission hump in the front of the car. He questioned the occupants further and tried unsuccessfully to get the driver to shut off his engine. Becoming suspicious and noting that at that point all the occupants had their hands in their pockets, Sampson tried to go to his scout car to get some help. (Tr. 254-56.)

As he started towards the scout car, he heard someone yell, "Hold it," and saw three of the occupants of the car bearing down on him with guns in their hands (Tr. 257-58). He identified two of them as appellants Barber and Hudson (Tr. 258-59). One of the three removed the officer's service revolver and as they backed away, they began firing at Sampson (Tr. 259-61). These men began to run up C Street in the direction of the housing project

and the car began moving slowly with them. Sampson lost sight of the car for a few seconds as it went around a curve at the top of the hill. (Tr. 261, 291.)

When the men began firing at him, Sampson retreated to his scout car, put out a brief look-out for them including the correct make, year, and tag number of the car (Tr. 306), and proceeded in the scout car in the direction they fled. A short distance up the hill on C Street he located the '58 Chevy abandoned with both doors wide open and its occupants gone. He saw two people go between the buildings on the hill, but could not tell if they were his subjects. However, he did spot one of the subjects running into a building nearby, 3925 C Street Southeast, and put in a call for further help. (Tr. 260-63.)

When help arrived, Sampson entered the building and saw appellant W. Shelton in the bathroom on the second floor sitting naked on the commode. Sampson recognized him as the driver of the vehicle and placed him under arrest. He was taken downstairs where his clothes were, allowed to dress and taken outside. (Tr. 263-65.)

The remainder of the appellants were arrested in the same housing project as follows: On the morning of March 7, 1966, Minnie B. Smith was in her first floor apartment at 324 Ridge Road, Southeast, which is just up the hill from C Street, when she heard a knock on her door. She opened the door, and a man standing in the hall, whom she identified as appellant Hudson (Tr. 325), asked to use her telephone. She consented and brought the phone to him. Hudson was neatly dressed, had a leather jacket on his arm, was wearing a black or brown hat, and appeared nervous. He asked her for a drink of water, and when she returned from the kitchen with the water, the police were present and had arrested Hudson. When they left with Hudson, he left his coat and hat in the apartment. (Tr. 318-23.) The police were recalled (Tr. 324), and Private K. Vasey, No. 14 Precinct, responded to Mrs. Smith's apartment and recovered Hud-

son's coat and hat. In a pocket of the coat, the officer found a black automatic. (Tr. 324, 369-71.) The gun was loaded with a clip containing five live rounds and one spent shell which had not properly ejected and had jammed the slide (Tr. 429, 454-55).

Private Francis A. Sopata, No. 14 Precinct, responded in a police wagon to the 3900 Block of C Street, Southeast between 9:05 and 9:15 a.m. on March 7. He proceeded on foot up the hill between the buildings to the vicinity of 332 Ridge Road, Southeast, where he had a conversation with two people at a bus stop nearby. As a result of that conversation, he proceeded to the entrance of No. 332. After talking with the occupant of a second floor apartment, Mrs. Emma J. Robinson (Tr. 347, 449), he hollered up the stairs, "Come on down, throw anything you have down, and put your hands up." Appellant Leonard Shelton threw his coat down, came down the steps, and was arrested by Sopata. (Tr. 339-48.) Mrs. Robinson had seen the police outside her house and looked out onto the second floor hallway. She saw a man sitting there on the floor "crushed up into the corner" near a window which faces Ridge Road. (Tr. 331-33, 336-37.) At the time of his arrest, according to his own testimony, L. Shelton had approximately \$192 on him, including several dollars worth of change (Tr. 582, 593-94).

At approximately 1:30 p.m. on March 7, Detective Sergeant Robert D. Arscott received a phone call at the 14th Precinct from a woman who informed him that Adolph Barber was at 3913 C Street, Southeast (Tr. 368). Arscott arrived at that address at about 1:40 p.m. and placed appellant Barber under arrest. Barber was dressed in clothing which appeared to have been freshly pressed and recently put on and he appeared to have just gotten out of a shower. (Tr. 367-68.) The woman who opened the door for Detective Arscott identified herself as Barber's sister (Tr. 368-69). Earlier that morning, Officer Lawrence L. Dorsey, No. 14 Precinct, recovered a Coca Cola box in the rear of 3913 C Street, Southeast outside the

building on a platform near the steps leading to the rear entrance (Tr. 389, 401, 405-06). In the box were money bags filled with \$339.93 in change and \$98.00 in bills, sun glasses and three food stamps (Tr. 402-03).

From the rear of the white 1958 Chevrolet bearing District of Columbia tags 3 LZ 14, Detective Samuel W. Selbe, then of the Robbery Squad, recovered a cardboard box which contained a smaller black box with papers in it; lying loose in the cardboard box was \$297.11 in currency and change (Tr. 377, 381-83, 385). On the front seat of this car, Detective Selbe found three wallets which contained papers relating to appellants W. Shelton, L. Shelton, and Barber, Government Exhibits 10, 11, and 12 respectively (Tr. 383-84, 480-82, 534-35). In their testimony, appellant L. Shelton acknowledged that Government's Exhibit 11 was his wallet (Tr. 586) and appellant Barber acknowledged that Government's Exhibit 12 was his (Tr. 563).

Ira Hudes, co-manager of the Food Plaza and brother of the deceased Sidney Hudes, identified the black box recovered by Detective Selbe and the personal papers it contained as the property of Food Plaza which he kept in the safe at the store (Tr. 412-16). He identified the money bags recovered by Officer Dorsey in the rear of 3913 C Street, Southeast as money bags he kept in the Food Plaza safe (Tr. 418-19), and he identified the contents of one of these bags by a register tape from the Food Plaza and a charge ticket of one of his employees found in the bag (Tr. 421).

At the close of the government's case, appellants' motions for judgment of acquittal were denied (Tr. 515-19, 528-33). Appellant L. Shelton's motion was denied on the ground that there was sufficient evidence for the jury to find appellant guilty as an aider and abettor on all three counts (Tr. 493-98, 528).

Appellants' Cases

Appellant Barber testified that on March 7, he left his rooming house at 7:00 a.m. but for some unexplained reason decided not to go to work and called his boss to tell him he would not be in (Tr. 555-57). After spending some time in the vicinity of 8th and K Streets, Southeast, he took a bus to his sister Genevieve Barber's house at 3913 C Street, Southeast, arriving there no later than 10:30 a.m. (Tr. 543-44, 556, 558-59). As soon as he arrived at his sister's, she told him the police had been there looking for him and they wanted to talk to him. He told her to call the police, which she did, and when they arrived, Barber was arrested for these crimes (Tr. 544-45, 560). Barber admitted being friendly with the Shelton brothers all his life and having known Hudson for several months at the time of these offenses (Tr. 549). He worked with W. Shelton and had ridden to work with him in Shelton's white '58 Chevrolet on Saturday, March 5, 1966. He claimed to have lost his wallet in an unknown manner by at least the Wednesday before the robbery, and although he rode to work every day in Shelton's car, he never searched it for his wallet, which he identified as Government's Exhibit 12. (Tr. 546, 549-55.) Barber also admitted having been convicted of house-breaking in March, 1962 (Tr. 547).

Barber's sister corroborated his story about calling the police (Tr. 565-69), but she said he had not arrived at her house until shortly before noon, approximately three hours after the police had been there about 9:00 a.m. (Tr. 566, 570, 573).

Leonard Shelton testified that he left his mother's house at 7:30 a.m. on March 7, and went by bus to his brother's friend's house at 3925 C Street, Southeast (Tr. 576). He stated that when he got off the bus across the street from 332 Ridge Road, Southeast, he saw ten policemen with their guns drawn coming towards him (Tr. 579). He claimed that he therefore walked, not ran, into 332 Ridge Road and stood on a landing between the first and

second floor until he was arrested (Tr. 580-81). At the time of his arrest, he had \$192 in bills and change on him, part of which he claimed was given him by his mother to pay her rent and rest of which he claimed he had saved and was using to repair his blue '58 Ford (Tr. 577, 582, 593-94). His brother, William, owned a two-door white, 1958 Chevrolet. Leonard believed he left his wallet, which he identified as Government's Exhibit 11, in William's car the night before the robbery. However, he did not call his brother at his girlfriend's house that night after his brother took him home and told him he would be staying at her house (Tr. 585-87, 590). He'd known Barber all his life and met Hudson with his brother a few months before the offense (Tr. 588). He denied he was crouching down under a window on the second floor of the building as testified to by Mrs. Robinson (Tr. 595).

Appellant W. Shelton's case consisted of a stipulation that if Barbara Waters were to testify, she would say that W. Shelton visited her frequently at her house at 3925 C Street, Southeast (Tr. 606-07), and the testimony of Officer William H. Goren that on the date in question he observed Officer Sampson at the entrance to 3925 C Street, Southeast, heard him say, "I seen him go in here," entered the building and saw W. Shelton on the commode, and heard appellant say, "What's going on" (Tr. 607-08, 611-12).

After subpoenaing his brother Theodore Hudson, who refused to testify, appellant Hudson rested his case without putting on any evidence (Tr. 629-30). At the close of all the evidence, neither appellant renewed his motion for a judgment of acquittal (Tr. 630).

The facts pertinent to the questions raised by appellants concerning extrajudicial identifications and the conduct of appellant Hudson during the course of the trial will be set forth in the portion of appellee's argument which deals with those issues.

SUMMARY OF ARGUMENT

I

Appellants are precluded by *Stovall v. Denno*, 388 U.S. 293 (1967) from claiming a denial of right to counsel at pre-*Wade* and *Gilbert* out-of-court confrontations for identification, the only issue on this point raised in their briefs. However, should they belatedly claim a denial of due process, their failure to object to the admissibility of the government witnesses' trial identifications on any ground precludes their making such an objection on due process ground for the first time in this Court. In any event, the record clearly shows that the lineups and other confrontations conducted in this case were not "so unnecessarily suggestive and conducive to irreparable mistaken identification" that appellants were denied due process of law. *Stovall v. Denno*, *supra* at 302.

II

The only serious incident of misconduct by appellant Hudson which occurred in the jury's presence was limited to the morning of the third day of trial. The efforts of the trial court to prevent any misconduct on the part of any defendants from reaching the eyes of the jury, the court's effective admonition to Hudson of the steps it would take, if his conduct on the third morning was repeated, the court's timely cautionary instruction to the jury that it should not allow the conduct of any defendant to prejudice it against the codefendants, and the careful deliberation of the jury nine days after receiving this cautionary instruction manifestly demonstrate that these appellants suffered no actual prejudice as a result of Hudson's conduct. Hence, denial of a mistrial and/or a severance did not amount to an abuse of discretion by the trial court.

III

Appellant Leonard Shelton's presence in the back seat on the driver's side of the get-a-way car seated next to part of the "loot" which was in plain view within minutes of and approximately four blocks from the scene of the robbery, plus the inference of guilt from his flight and concealment following the fusillade fired at a police officer by his companions was sufficient evidence from which reasonable men could infer beyond a reasonable doubt that this appellant aided and abetted his friends and brother in these crimes. Hence, the trial court properly denied appellant's motion for a judgment of acquittal and correctly submitted all three charges to the jury for its consideration.

IV

The trial court properly instructed the jury that the government had the burden of establishing the identity of appellants beyond a reasonable doubt as the individuals observed by the witnesses to these crimes and that unless the jury found that it was appellants who were "involved" in these crimes, not some other individuals the witnesses had mistaken for appellants, the jury was to consider the charges against them no further. The jury was further instructed that if it were satisfied beyond a reasonable doubt of any appellant's identity on any count or counts, then it must "further consider whether the Government has proved the essential elements of the offense charged in such count or counts." Therefore, viewed in the context in which it was given and in conjunction with the jury charge as a whole, the use of the term "involved" in the court's "identification" instruction could not have misled or confused the jury.

V

It was not an abuse of the trial court's discretion to deny appellant Hudson's motion to dismiss his court-appointed attorney raised for the first time at the beginning

and during the course of the trial, where it was obvious to the court that this motion was part of a deliberate attempt by Hudson to disrupt and obstruct the course of his trial in order to prevent his conviction in view of the overwhelming evidence against him.

ARGUMENT

- I. Appellants may not attack, for the first time on appeal, their out-of-court identifications by government witnesses on either right to counsel or due process grounds.

(Tr. 92, 96-98, 104-116, 119, 122-23, 156-59, 163-68, 191, 204-07, 218-22, 225-26, 238, 257-58, 273-77, 301-03, 515-19, 528-33, 664-83)

Appellants Barber, Hudson, and W. Shelton complain, for the first time on appeal, that the trial identifications of them by various government witnesses should have been excluded from evidence because these witnesses had identified appellants on the day of these offenses at line-ups or other confrontations in the absence of counsel. *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967).

However, since the confrontations in this case all took place prior to June 12, 1967, even had the right to counsel ground been asserted at trial, appellants would not be entitled to the benefits of the *Wade* and *Gilbert* decisions. *Stovall v. Denno*, 388 U.S. 293 (1967); *Wise v. United States*, No. 20,259, D.C. Cir., July 27, 1967, at 5.

Should appellants belatedly² claim that the circumstances of these confrontations were so unfair as to deny them due process of law, *Stovall v. Denno*, *supra* at 301-02; *Wise v. United States*, *supra* at 6-7, appellee submits that appellants' failure to attempt to exclude the witnesses' trial identifications on due process, right to counsel

² In their briefs, appellants do not attack their pre-trial identifications on due process grounds, but rely solely on the lack of counsel at these events. (Appellant Barber's Brief at 10-14.)

or any other ground, precludes them from challenging the admissibility of that testimony on due process grounds for the first time on appeal.

No attempt was made by appellant to exclude the various witnesses' identification of them at trial on any ground. No objection was made by any defendant at the time any of the government witnesses identified the appellants as participants in these crimes. Indeed, the fact of and the circumstances surrounding the pre-trial identifications were brought out by appellants in an unsuccessful effort to discredit the witnesses courtroom identifications and create a reasonable doubt that appellants were the participants in these crimes.³ This was the thrust of their motions for judgments of acquittal (Appellant Barber at Tr. 515-18; Appellant Hudson at Tr. 518-19; Appellant W. Shelton at Tr. 528-33), which the trial court denied as bearing on the weight to be accorded the identification testimony by the jury as trier of fact (Tr. 517, 519, 531). Again in their closing arguments to the jury, appellants tried to discredit the identification testimony relevant to them as a result of the facts brought out by their cross-examinations concerning the pre-trial confrontations (Appellant Barber at 664-69; Appellant Hudson at 663-64; Appellant W. Shelton at Tr. 670-83); obviously the jury by its verdict rejected these arguments.

Having failed in their sole purpose at trial in exploring this evidence, i.e., to create a reasonable doubt in the jury's mind of appellants' involvement in these crimes, they may not now, for the first time on appeal, object to the admissibility of this evidence on either right to counsel or due process grounds. The total absence of any objection to this testimony below effectively deprived the

³ Witness Jones: Appellant Barber at Tr. 106-16, Appellant Hudson at Tr. 119, 122-23; Witness Rose: Appellant W. Shelton at Tr. 156-59, 163-68; Witness Perry: Appellant W. Shelton at Tr. 204-05, Appellant Hudson at 205-07; Witness Duvall: Appellant W. Shelton at 218-21, Appellant Hudson at 222, 225-26; Witness Ward: Appellant W. Shelton at 238; Officer Sampson: Appellant Barber at 273-77, Appellant Hudson at 301-03.

government of an opportunity to defend its position with facts and argument or possibly to forego the introduction of the particular testimony objected to. We do not think appellants may ignore these considerations and press a due process complaint here. See e.g., *Fuller v. United States*, No. 19,532, D.C. Cir., November 20, 1967 at 24-25; *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). Nor could the failure to exclude such testimony on due process grounds prior to the promulgation of *Stovall* in the absence of any objection be considered plain error under Rule 52(b), Fed. R. Crim. P. See (*Reginald*) *Robinson v. United States*, No. 19,482, D.C. Cir., July 26, 1967; *Kennedy v. United States*, 122 U.S. App. D.C. 291, 353 F.2d 462 (1965); (*Robert*) *Gray v. United States*, 114 U.S. App. D.C. 77, 311 F.2d 126 (1962), *cert. denied*, 374 U.S. 838 (1963); *Johnson v. United States*, 110 U.S. App. D.C. 187, 290 F.2d 378 (1961). Cf. *Fuller v. United States*, *supra*.

In any event, absence of counsel aside, *Stovall v. Denno*, *supra* at 301; *Wise v. United States*, *supra* at 6, the record herein clearly does not support a contention that the line-ups and other confrontations conducted in this case were "so unnecessarily suggestive and conducive to irreparable mistaken identification" that appellants were denied due process of law. *Stovall v. Denno*, *supra* at 302.

None of the hold-up men wore masks or other facial covering during the course of the robbery or the assault on Officer Sampson. Only Hudson was described by four witnesses to have worn distinctive, light colored sunglasses which did not hide his eyes. These witnesses, Jones (Tr. 92, 119), Perry (Tr. 191), Duvall (Tr. 214), and Officer Sampson (Tr. 302), were able to describe the color and style of Hudson's coat and hat in addition to the sunglasses. All four witnesses attended a lineup at the 14th Precinct conducted on the morning of March 7 (Tr. 107-08, 214-15, 219, 301) which consisted of from 8 to 10 men (Tr. 219). The witnesses were not told they were going

to view a line-up until after they arrived at the precinct and the line-up was assembled (Tr. 107-08, 226). The witnesses were situated so that they could not observe other witnesses and their identifications, if any (Tr. 220). The defendants were not pointed out to the witnesses prior to their identifications; they were merely told that if they recognized anyone as a participant in the hold-up, to pick him out (Tr. 108, 226).

The integrity and lack of suggestibility of this line-up procedure is pointed up by the fact that although these witnesses had all seen several participants in the events they witnessed, they only identified one man, appellant Hudson, in the line-up, despite the fact that at least when Jones and Duvall viewed the line-up, appellant L. Shelton was also in it, a fact acknowledged by these witnesses on cross-examination (Tr. 120, 224). The fairness and absence of suggestion is also illustrated by Witness Ward's testimony, which revealed that she was so frightened at the time of this line-up, she identified a police officer who was in the line-up (Tr. 238).

Furthermore, the civilian witnesses identified Hudson by such physical features as his eyes (Jones, Tr. 123; Perry, Tr. 206), facial structure, height, and nose (Duvall, Tr. 222), and Officer Sampson only tentatively identified him at the lineup by the coat, hat and sunglasses he had seen Hudson wearing at the time of the assault (Tr. 302).

Of course, Hudson's identification was corroborated by his arrest in the housing project adjacent the abandoned get-a-way car and the recovery of his hat, coat and gun in Mrs. Smith's apartment where he had nervously asked for the use of the telephone and a glass of water.

Appellant W. Shelton was identified by Witness Rose at a line-up held in the United States Courthouse on March 7, consisting of four men. Rose "immediately" identified this appellant at the lineup as the man who had forced him at gunpoint to fill a money bag with the money from his cash register. (Tr. 156-58, 168.) W. Shelton had been in front of his face approximately two minutes dur-

ing the robbery (Tr. 162) and he was able to identify appellant by "his face and all, and his little mustache and his sunken cheekbones" (Tr. 170). Leonard Shelton was in this lineup but Rose did not identify him (Tr. 169). After Rose identified W. Shelton, a detective told him this appellant was one of the men who was in the store (Tr. 169). W. Shelton was also arrested in the housing project by Officer Sampson who followed a suspect he saw running into 3925 C Street, Southeast, and who recognized this appellant as the driver of the '58 Chevy when Sampson saw him sitting on the commode at that address. Of course, W. Shelton's wallet was also found in the abandoned get-a-way car which his co-defendants stated belonged to him.

Thus, considering Rose's opportunity to observe W. Shelton and the immediacy of his line-up identification based on recognition of appellant's facial features, it cannot be said that this confrontation under all the circumstances was "unnecessarily suggestive and conducive to irreparable mistaken identification." Furthermore, Officer Sampson's arrest by appellant after he recognized him as the driver of his abandoned get-away-car would be sufficient by itself to sustain W. Shelton's conviction as an aider and abettor of these crimes.

Appellant Barber was identified at trial by witness Jones as the second gunman who entered the meat room after Hudson had forced Jones in there and who, with Hudson, put Jones and the other employees in the refrigerator room (Tr. 96-98, 104-05). On cross-examination, Jones said he had seen Barber twice since the robbery. The first occasion was between 3:00 and 3:30 p.m. the afternoon of the robbery. Jones was sitting on a bench in an office in the United States Courthouse when Barber was brought in apparently by a Deputy U.S. Marshal. Jones was not called upon to identify Barber at that time nor did he volunteer an identification to anyone (Tr. 112-115). This incident presumably took place in the U.S. Commissioner's Office, since Barber was pre-

sented to the Commissioner at 3:05 p.m. that afternoon⁴ (Tr. 219). Hence, it cannot be considered an out-of-court confrontation for the purpose of identification, but was merely an example of a witness being present when a criminal defendant is brought before a judicial officer. It is pointed out that Frank Rose was also present with Jones, but Rose did not identify Barber at trial, a strong indication that no one suggested to these witnesses that Barber was one of the robbers (Tr. 114-15). The second occasion was on Thursday, October 20, 1966, the day the trial began, and Jones saw Barber in the courtroom (Tr. 115). It is submitted that this incident is no different in character than the preceding one; neither can be said to have resulted in a denial of due process to Barber.

Officer Sampson identified Barber as one of the three men who came at him with guns pointed (Tr. 257-58). The fact that he could only identify two of these men, although in so doing he was able to identify all four of the occupants of the car, negatives any possibility that when he next saw Barber in the Detectives' Office of the 14th Precinct (Tr. 273-77), his identification of Barber at that time was unfairly suggested by the circumstances of the confrontation. Of course, Barber's wallet was also found in the get-a-way car, thus corroborating the witness' identification of him as a participant in these crimes.

Hence, the record in this case would not support a conclusion that these witnesses' identifications at trial of appellants was the product of such unfair pre-trial confrontations as to result in a denial of due process; on the contrary the fairness of these confrontations free of any unnecessary suggestiveness is apparent from the facts.

⁴The Commissioner's Record of Proceedings, Commissioner's Docket No. 20, Case No. 290, *United States v. Adolph Barber*, filed as part of the record in Criminal Case No. 669-66 on March 18, 1966, which is included in the record on appeal, reflects that appellant Barber was first presented to the Commissioner on March 7, 1966 at 3:05 p.m. and that the case was continued to March 17, to allow Barber an opportunity to contact the Legal Aid Agency.

II. Appellant Hudson's conduct was not prejudicial to his co-defendants so as to render the trial court's denial of a mistrial and severance an abuse of discretion.

Tr. 8, 19-24, 56, 57, 69-70, 83-84, 124, 133-39, 160, 304, 311, 313, 326-30, 359-60, 365, 600-06, 622-28, 473, 729-32)

Appellants Barber, W. Shelton, and L. Shelton contend that the trial court erred by not severing their trials from that of Appellant Hudson because Hudson's conduct during the trial prejudiced the jury against them.

Appellee submits that the efforts of the trial court to prevent any misconduct on the part of any defendant from reaching the eyes of the jury, the court's timely cautionary instruction to the jury that it should not allow the conduct of any defendant to prejudice it against the co-defendants, and the careful deliberation of the jury manifestly demonstrate that these appellants suffered no actual prejudice as a result of Hudson's conduct. Hence, denial of a mistrial and/or a severance did not amount to an abuse of discretion by the trial court.

There is no question that all four appellants were properly joined for trial under Rule 8(b), Fed. R. Crim. P.; no pre-trial motion for severance was filed by any of the appellants.

Under Rule 14 of these Rules, "if it appears that a defendant . . . is prejudiced by a joinder . . . of defendants in an indictment . . . or by such joinder for trial together, the court may . . . grant a severance of defendants or provide whatever other relief justice requires." (Emphasis added.) Thus, "Rule 14 recognizes [that] joinder even where authorized may prejudice one or both of the co-defendants, and in that case severance or some other form of suitable relief is required." *Rhone v. United States*, 125 U.S. App. D.C. 47, 365 F.2d 980 (1966). (Emphasis added.)

However, the decision to grant or deny a severance in a particular set of circumstances lies in the sound discretion of the trial judge which should only be overruled on ap-

peal where clearly abused. (*Jesse L. Barnes v. United States*, No. 20,373, D.C. Cir., June 15, 1967; *Brown, Irby, and Jones v. United States*, — U.S. App. D.C. —, 375 F.2d 310, 315 (1966); *Cupo v. United States*, 123 U.S. App. D.C. 324, 328, 359 F.2d 990, 994 (1966).

The trial of this case took place over a two week period on six actual trial days with gaps as long as four days between trial days in which the jury was excused from sitting. On Thursday, October 20, 1966, the first trial day, after Hudson and his attorney, Manuel L. Avancena, were introduced by the prosecutor to the prospective jury panel on *voir dire*, the following occurred:

MR. AVANCENA: Mr. Hudson is on crutches.

DEFT. HUDSON: I would like to make a statement.

THE COURT: You will not make a statement.

DEFT. HUDSON: I would like to make an oral motion.

THE COURT: You will not make an oral motion at this time. You will be seated, please. (Tr. 8.)

When appellant Barber was introduced to the jury panel he stated with respect to his attorney, "I don't want him to represent me," and was told by the court to be seated (Tr. 9).

At the conclusion of the government's *voir dire*, the trial judge excluded the jury panel from the courtroom and asked Hudson and Barber what it was they wished to say (Tr. 19-20). They both moved to dismiss their attorneys on grounds which the court after inquiry found to be insufficient, and their motions were denied (Tr. 20-23). The court then admonished all four defendants as follows:

Now, gentlemen—I am addressing myself to the four defendants—this trial is going to be conducted in a proper fashion, without any untoward incidences whatever, and if it isn't, we will take such steps as are necessary to cause the trial to be so conducted.

I don't expect any outbursts or anything else on the part of the defendants, and if there is, we will take

such steps as are necessary to take care of it. (Tr. 23.)

Thereupon, appellant W. Shelton alone, through his attorney, Leonard L. Lipshultz, moved for a severance on the alleged ground that the jury panel had been prejudiced against him because of the so-called "disturbance" caused by his co-defendants (Tr. 23-24). The court denied this motion with this observation:

Let me tell you this: You are not going to get a mistrial in this case by one or more of the defendants acting up. I will properly instruct the jury as to that, but you are not going to do that, they can't play that game. (Tr. 24.)

It is clear, therefore, that the trial judge sensed that appellants were deliberately attempting to disrupt their trial and cause a mistrial, and that the court intended to take such steps as were necessary to prevent a mistrial, if possible, induced by their conduct.

After the jury was picked and sworn, it was excused for lunch. Upon its return, the court again excluded the jurors from the courtroom in order to take steps to forcibly bring Hudson into the courtroom outside the jury's presence (Tr. 56). At a bench conference at the conclusion of the government's opening statement the court spread on the record the circumstances which necessitated this action (Tr. 69-70). Hudson had refused to come out of the cell block and was holding off the Marshals with a crutch. The court sent for reinforcements and authorized the use of leg irons and handcuffs, if needed, to bring Hudson into the courtroom without his crutches. However, the Marshals were able to carry Hudson into court on a chair without handcuffs and leg irons. The court admonished Hudson that if he repeated his conduct, leg irons and handcuffs would be used (Tr. 57), but this did not become necessary during the remainder of the trial. Indeed at the end of the day's session, the Court returned Hudson's crutches to him with the further admonition that they would be taken away permanently, if he again

threatened or attacked a Marshal with them (Tr. 83-84). Such an incident did not, however, reoccur.

On Monday, October 24, 1966, the second day of trial, while the jury was excused for mid-morning recess (Tr. 124), appellant Hudson renewed his motion to dismiss his attorney. After a lengthy discussion, the court denied this motion as well as Hudson's motion to sever the counts against him. (Tr. 133-39.) There were no instances of misconduct of any kind by Hudson on this day.

However, on the third day of trial, Tuesday, October 25, 1966, during the cross-examination of Officer Sampson, the court had to instruct Hudson to "please be quiet" (Tr. 304). Shortly thereafter, while the court was conducting a bench conference, Barber's counsel, John J. Dwyer, informed the court that Hudson had "been talking out loud to his counsel" and Avancena acknowledged that his client had been "threatening" and that he had had "enough abuse" (Tr. 311, 313). Although at that point the trial judge indicated he could only take care of what he observed, he soon had to once more instruct Hudson to be quiet (Tr. 313, 326). The court immediately excluded the jury from the courtroom and the colloquy reproduced in substantial part in appellant L. Shelton's brief at 10-12 took place (Tr. 326-30). Hudson expressed dissatisfaction with the court's refusal to dismiss his counsel and told the judge that he talked like "a damn moron." The judge warned Hudson in no uncertain terms that if he did not behave and sit quietly, he would be manacled and gagged. Counsel for Barber and W. Shelton informed the court that Hudson had been using strong language which they believed could be heard by the jury. W. Shelton's renewed motion for severance was denied.

When the jury returned to court, it received the following cautionary instruction:

If you have heard any untoward remark by any of the defendants, or if you have observed any untoward action by any of the defendants, I caution you that you must not hold any such remark or action

against any other defendant, nor must you permit such a thing to prejudice you against any other defendant. (Tr. 330.)

From that point forward, throughout the remaining three days of trial over the next nine days, no further incidents of misconduct by Hudson occurred nor were any objections concerning his conduct made by his co-defendants. In addition, the jury ceased hearing evidence at noon on October 25 (Tr. 359-60), and did not return to the jury box to hear further testimony until Thursday morning, October 27, 1966 (Tr. 365). Hence, any possible prejudice embraced by the jury towards Hudson's co-defendants because of his conduct which was not cured by the court's cautionary instruction, undoubtedly dissipated during the two-day break in the proceedings following the incidents and unquestionably disappeared before the jury began its deliberations nine days later on the afternoon of Thursday, November 3, 1966. Cf. *Fulwood v. United States*, 125 U.S. App. D.C. 183, 185, 369 F.2d 960, 962 (1966).

Contrary to the implications in Appellant Barber's brief at 5-6 and 16,⁵ during the rest of the trial Hudson addressed the court in a respectful manner and only when the jury was not present (Tr. 364-65, 600-06, 622-28); the court thoroughly considered each of his requests before granting or denying them.

⁵ The statement on pages 5-6 of Appellant Barber's brief and page 6 of appellant W. Shelton's brief that "during the course of the trial * * * defendant Hudson made many outbursts in the presence of the jury (Tr. 8, 20-21, 25, 56-59, 69-70, 133-138, 304, 313, 326-330, 364-365, 601-606, 623-628)," is extremely inaccurate and misleading. As indicated in the text of appellee's brief only two of these incidents on two separate days took place in the jury's presence (Tr. 8 and 304, 313, 326-30) and only the second has any significant relationship to the issue of prejudice to Hudson's co-defendants. Furthermore, only two of the motions for severance made by appellant W. Shelton, not L. Shelton as stated in Appellant Barber's brief at 16, were directed at Hudson's conduct and corresponded with the two incidents noted above (Tr. 24 and 329-30). The other two motions for severance were for other reasons not the subject of the present appeal (Tr. 160 and 473).

In reality, therefore, there was only one serious incident of misconduct by Hudson during this trial in the jury's presence which was limited to the morning of the third day. When viewed in this context, it is evident that the trial judge did not abuse his discretion by denying appellant's motions for mistrial and severance and granting other relief in the form of the cautionary instruction to the jury and what proved to be an effective warning to Hudson to behave and remain quiet or he would be bound and gagged.

Under the circumstances the trial court was entitled to expect that the jury would obey this instruction, see *Spencer v. Texas*, 385 U.S. 554, 562-63 (1967), and the record reflects that the jury directed its deliberations to the facts in evidence and not Hudson's conduct. Sometime after the jury began its deliberations on November 3, nine days after it had received the court's cautionary instruction, its foreman sent this note to the court: "The jury would like to know when was Leonard Shelton initially identified and by whom" (Tr. 729). After receiving this information from the court with the approval of L. Shelton's counsel (Tr. 730-32), the jury continued its deliberations until 4:25 p.m. that afternoon when it returned a sealed special verdict which was not opened until the following morning.⁶

In the special verdict, the jury had to indicate in writing its verdict against each defendant on each count charged against him, which by itself strongly insures individual consideration of each defendant on the merits of the government's case against him. See *Monroe v. United States*, 98 U.S. App. D.C. 228, 237, 234 F.2d 49, 58, *cert. denied*, 352 U.S. 873 (1956). Finally, the total absence of prejudice in the minds of the jury as a result of this joint trial is clearly manifested by the fact that appellant L. Shelton was acquitted on two of the three counts

⁶ Record in Criminal Case No. 669-66, included in the record on appeal.

against him. (*Jesse L. Barnes v. United States*, No. 20,373, D.C. Cir., June 15, 1967 at 3.

Conduct far more flagrant than Hudson's was found by the Second Circuit to be not so prejudicial to the miscreant's co-defendants to require a mistrial and severance in a narcotics conspiracy case. *United States v. Bentvena*, 319 F.2d 916, 929-32 (2d Cir.), *cert. denied sub. nom.*, *Ormento v. United States*, 375 U.S. 940 (1963). The courtroom misconduct was summarized by the Court as follows:

During the polling of jurors on this opening day of trial, the first outburst by Salvatore Panico occurred. This incident was a precursor of events to come. Similar outbursts by Panico and other defendants became commonplace. On one occasion Panico climbed into the jury box, walked along the inside of the rail from one end of the box to the other, pushing the jurors in the front row and screaming vilifications at them, the judge, and the other defendants. On another occasion, while the defendant Mirra was being cross-examined by the Assistant United States Attorney, Mirra picked up the witness chair and hurled it at the Assistant. The chair narrowly missed its target but struck the jury box and shattered. The trial judge responded to these outbursts by having the perpetrators gagged and shackled. We have described only two of the more dramatic disturbances which plagued the trial of this case for we find it neither necessary nor judicious to publicize or preserve the vile language and rebellious conduct that characterized this trial. *Suffice it to say that more abhorrent conduct in a federal court and before a federal judge would be difficult to conceive.* 319 F.2d at 929-30. (Footnote omitted.) (Emphasis added.)

The Court then held:

As to the failure to sever certain defendants and to declare a mistrial after these outbursts, we look to our recent decision in *United States v. Aviles*, *supra*.⁷

⁷ 274 F.2d 179 (2d Cir. 1959), *cert. denied*, 362 U.S. 974 (1960).

There, as here, a defendant burst into a tirade before the jury accusing his co-defendants. There as here, the trial judge promptly instructed the jury to disregard the outbursts. We said, in answer to the contention that reversal was required:

"Manifestly it was not error to deny the mistrial motions. If such conduct by a co-defendant on trial were held to require a retrial it might never be possible to conclude a trial involving more than one defendant; it would provide an easy device for defendants to provoke mistrials whenever they might choose to do so. Under all the circumstances the trial judge's instructions adequately dealt with the situation and his denial of the mistrial motions was proper." 274 F.2d at 193.

This case differs from *Aviles* only in that the outbursts of the defendants were more numerous and more offensive. But the trial judge instructed the jury to ignore the outbursts each time they occurred. This is all that he could do apart from taking steps to prevent their repetition. We have satisfied ourselves that the prosecution did not provoke the incidents. *The judge did all in his power to minimize their effect, and we find no ground for reversal in the circumstances. Any other answer to these contentions would produce little less than anarchy.* 319 F.2d at 831. (Emphasis added.)

In *Brown, Irby, and Jones v. United States*, — U.S. App. D.C. —, 375 F.2d 310, 316 (1966), this Court cited *Bentvena* with approval in rejecting a claim of prejudice by Irby and Jones based on a fit thrown in the presence of the jury by co-defendant Brown, who was defending on the grounds of insanity, even though the fit resulted in a five day suspension of the court proceedings. It is submitted that *Bentvena*, when applied to the present case, requires a similar result.

Appellant's reliance on *Wilson v. United States*, 120 U.S. App. D.C. 72, 344 F.2d 166 (1965) is also misplaced. There the appellant and his co-defendant disrobed

in the cellblock. The trial judge ordered them wrapped in blankets, placed in leg irons and handcuffs, and brought into the courtroom in that manner where they were so viewed by prospective jurors; they remained handcuffed throughout the three day trial. Nevertheless, this Court affirmed Wilson's conviction on the ground that the "evidence of guilt was so clear and strong" the jury's verdict could not have been affected by the restraints put on him. *Id.* at 73, 344 F.2d at 167. The Court added, however, that:

though an accused may not be permitted to prevent his trial by obstructive tactics, the trial court is under obligation to make a reasonable effort to obviate such conditions, even though they are created by the defendant's own conduct, because of their tendency to prejudice the accused in the eyes of the jury. Here, for example, the prospective jurors and witnesses could have been excused while the defendants were brought before the court, admonished, and the course the court intended to pursue explained to them, with opportunity then afforded them to abandon their tactics. It is possible that in this or some like manner the situation could have been avoided, and it is desirable to explore that possibility when such a situation arises. *Ibid.*

In the instant case, of course, the judge followed the course suggested in *Wilson*, and succeeded after the incidents on October 25 to control Hudson's conduct without resorting to the threatened use of physical restraints. Moreover, the evidence of guilt against all defendants, particularly Hudson, Barber and W. Shelton, was clear and strong; this fact plus the illustration in the record of the jury's careful deliberation over the evidence applicable to appellant L. Shelton's guilt or innocence (Tr. 729), should be more than sufficient to satisfy this Court that the verdict was not affected by prejudice stemming from Hudson's trial conduct.⁸

⁸ Appellant W. Shelton's complaint that the trial transcript does not reflect every word that Hudson may have said during the trial

III. There was ample evidence from which the jury could conclude beyond a reasonable doubt that appellant L. Shelton was guilty of the crimes charged.

(Tr. 213, 239-41, 245, 247-49, 251-52, 254-63, 287-304, 307, 331-33, 336-37, 339-48, 383-84, 480-82, 534-35, 586, 720-22)

Appellant L. Shelton contends that there was insufficient evidence of his participation in these crimes from which the jury could have found beyond a reasonable doubt that he was guilty; he asserts, therefore, that his motion for judgment of acquittal at the close of the government's case should have been granted.

Appellee submits that assuming the truth of the government's evidence and viewing that evidence in the light most favorable to the government, as the trial court and this Court must, there was ample evidence from which the jury might or might not have found L. Shelton guilty beyond a reasonable doubt as an aider and abettor in all three crimes charged against him. *Crawford v. United*

is inconsequential insofar as an effective review of the issue of prejudice is concerned. Although the court reporter while engaged in recording testimony of witnesses (Tr. 303-04) and colloquys between the court and counsel at bench conferences (Tr. 311-13, 326), was not able to report all of Hudson's statements at the counsel table, the statements by the court and counsel concerning Hudson's conduct adequately reflect the nature thereof (Tr. 313, 327).

Furthermore, if this appellant seriously considered the record insufficient, it was his responsibility to supplement it by way of motion in the court below so that the trial court could determine as a matter of fact what additional matter should be included in the record on appeal. Instead, appellant has resorted to filing affidavits in this court in an effort to supplement the record on appeal. This he plainly may not do. *E.g., Moore v. United States*, 359 F.2d 852 (5th Cir. 1966). Appellee is confident, therefore, that this Court will disregard these affidavits and for that reason has refrained from filing a motion to strike them as in violation of the rules of appellate practice. Appellee's position is the same with respect to the alleged letter set forth in appellant Hudson's brief on page 13 and the representation of conversations between Hudson's appellant and trial counsel acknowledging the existence of this letter on page 14, both of which are completely outside the record on appeal and should be disregarded by this Court.

States, — U.S. App. D.C. —, 375 F.2d 332 (1967); *Curley v. United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947). Hence, the trial court correctly submitted all three charges to the jury, which convicted appellant of assaulting a member of the police force and acquitted him of robbery and assault with a dangerous weapon.

The evidence against L. Shelton was as follows: Although appellant was not identified by any of the witnesses in the Food Plaza, four gunmen were seen in the store (Tr. 213) and three were identified as appellants Hudson, Barber, and W. Shelton. Within minutes of the robbery and approximately four blocks away from the store, a two-door white 1958 Chevrolet, driven by appellant's brother and occupied by three passengers, nearly ran down Officer Sampson and the young girl with him after running a stop sign (Tr. 239-41, 245). The Officer was positive there were four men in the car (Tr. 307), two in front and two in the rear, but because he could not see towards the door on the passenger side of the front seat, he could not say whether a third person was seated there (Tr. 247, 249, 251).

Sampson stood on the driver's side of the vehicle talking with the driver, and the Officer positively identified L. Shelton as being seated in the rear directly behind the driver (Tr. 251-52). Indeed, this appellant handed the Officer the registration card for the vehicle which contained his name as one of the owners and told Sampson the car was his and his brother was driving (Tr. 287, 304).

While checking the rear tags of the car against the registration, Sampson observed a brown cardboard box on the rear seat between L. Shelton and the other passenger seated in the rear. In plain view in that box, the Officer could see what proved to be the "loot" from the Food Plaza robbery, *i.e.*, money bags, coin wrappers, U.S. currency and some loose change. Upon returning to the front of the car, the Officer saw another box on the trans-

mission hump by the front seat with similar contents again in plain view. He also noticed all four men had their hands in their pockets, and he attempted to retreat to his scout car to summon help. (Tr. 254-56.)

Before he got very far, three of the men got out of the car with guns drawn and disarmed Sampson. Although Sampson could identify only two of them as being Hudson and Barber, after firing at the Officer, all three presumably got back into the car which had been following their retreat and escaped in the direction of the nearby housing project. (Tr. 257-61.) Sampson pursued them in his scout car and a few seconds later located the car a short distance from where he had first stopped it. The doors were open and its occupants were gone. However, Sampson spotted one of the subjects, who turned out to be the driver, W. Shelton, run into a nearby building in the project, and he summoned help. (Tr. 260-63, 291.)

Officer Sopata, who responded to the scene, was directed to 332 Ridge Road, S.E., by two citizens at a nearby bus stop. Mrs. Robinson, a tenant on the second floor of that building, had seen a man "crushed up into the corner" near a window in the hallway on the second floor, apparently hiding from the police outside. She conversed with Officer Sopata, and he ordered the man down from the second floor. Pursuant to this order, Leonard Shelton came down and was arrested. (Tr. 331-33, 336-37, 339-48.)

L. Shelton's wallet was found in the '58 Chevy, along with part of the proceeds from the Food Plaza robbery and W. Shelton's and Barber's wallets (Tr. 383-84, 480-82, 534-35, 586).

From these facts reasonable men could well infer that L. Shelton aided and abetted his three co-defendants in the commission of the robbery and assault with a dangerous weapon on Mr. Hudes and/or in the assault on Officer Sampson in an effort to prevent apprehension for the earlier crimes. *Cooper v. United States*, 123 U.S. App. D.C. 83, 85-86, 357 F.2d 274, 276-77 (1966). Defend-

ant's own uncorroborated version of how he arrived at and entered 332 Ridge Road, S.E., and his explanations for having \$192 in money and change at the time of his arrest and the loss of his wallet did not create a situation where there must be a reasonable doubt in a reasonable mind of his guilt in these crimes. *Crawford v. United States, supra*; *Curley v. United States, supra*. At most, his testimony created a question of credibility between appellant and the government's witnesses which the jury obviously resolved against him.

Appellant's case is readily distinguishable from the government's case against Paul E. Vaughn in *Goodwin v. United States*, 121 U.S. App. D.C. 9, 347 F.2d 793, cert. denied sub nom., *Vaughn v. United States*, 382 U.S. 855 (1965). In *Goodwin*, three men entered and robbed a grocery store, and when their get-a-way car was halted it was occupied by the four defendants. The fourth man, Paul Vaughn, was the only one not identified by the victim as being in the store during the robbery. The similarity between the cases against L. Shelton and Paul Vaughn ends there. The car in *Goodwin* was stopped by the arresting officer "about an hour after the robbery in another part of the city." *Id.* at 11, 347 F.2d at 795. Here, L. Shelton was placed by Officer Sampson in the back seat on the driver's side of the get-a-way car within minutes of and approximately four blocks from the scene of the robbery. In *Goodwin*, most of the "loot" was discovered under the front seat, in the glove compartment, or in the pocket of a raincoat on the rear seat. The only stolen property in plain view was an otherwise innocuous carton of Camel cigarettes. Government's Brief (No. 19,000-03), at 3-4, *Goodwin v. United States, supra*. Here, L. Shelton was seated next to one of two cardboard boxes which contained, in plain view from the outside of the car, the money bags, coin wrappers, bills and loose change stolen from the Food Plaza only minutes before.

Appellant L. Shelton did not and, in view of Sampson's testimony, could not testify, as did Paul Vaughn, that he had been offered a ride by his co-defendants in another

part of the city not in the vicinity of the Food Plaza, since it was he who handed the Officer the vehicle's registration, after the speeding car had been stopped within four blocks of the supermarket. Government's Brief (No. 19,000-03), *supra* at 4-5. These facts, combined with the inference of consciousness of guilt (Tr. 719-20) flowing from his flight in the auto with the men who fired at Sampson, his abandoning the auto with them shortly thereafter, and his attempts to hide from the police on the second floor of the building on Ridge Road, factors not present in *Goodwin*, where more than sufficient evidence to justify a conclusion beyond a reasonable doubt that L. Shelton participated in these crimes.

Nor can this appellant find solace in the case of *Cooper v. United States*, *supra*. If anything, that decision supports his conviction in this case. In that case, this Court found the evidence against Cooper sufficient "by a hair's breadth," to avoid a directed verdict of acquittal. "Based on a hurried glance", the victim identified Cooper as the third person in the vicinity just before he was attacked from behind and robbed by a man or men he could not identify. *Id.* at 85, 357 F.2d at 276. Cooper's co-defendants Taylor and Childs, were found with the stolen property on their persons while Cooper was not. Nevertheless, the Court found:

* * * there was evidence from which to infer that Cooper was an active participant or at least an aider and abettor of the crime. Cooper's payment of two cents to his friend Taylor could be viewed as a signal which in some way "triggered" the robbery, since immediately after the payment, Taylor informed Hill [the victim] that he could go and, after taking six steps, Hill was struck from behind. Also, Cooper was seen in the company of Taylor and Childs approximately fifteen minutes later and, after reaching Taylor's sister's home, urged Taylor to hurry because "they had to go." *Id.* at 85-86, 357 F.2d at 276-77.⁹

⁹ However, the trial judge in *Cooper* erroneously instructed the jury that it could convict Cooper on Hill's identification alone, where-

Leonard Shelton's presence in the get-a-way car in close proximity to the time and place of the robbery, seated next to part of the proceeds, plus the inference of guilt from his flight and concealment following the fusillade fired at a police officer by his companions, in comparison with *Cooper*, create a far superior inferences that appellant here aided and abetted his friends and brother in these crimes.¹⁰

as on appeal this Court said the judge should have pointed out that "identification would establish Cooper's presence only, and that conviction would also require a belief that he joined in the robbery or aided in its commission." *Id.* at 86, 357 F.2d at 277.

In contrast, here the trial judge in his identification instructions, (discussed *infra* Part IV) carefully and correctly told the jury that if it were satisfied that the government had established appellants' identities at the scenes of these crimes beyond a reasonable doubt, it must "further consider whether the Government has proved the essential elements" of the offenses charged against appellants beyond a reasonable doubt in accordance with the court's previous instructions (Tr. 720-22).

¹⁰ Appellant L. Shelton's contention that he was prejudiced by the joinder for trial of all three offenses is untenable. No motion to sever, pursuant to Rule 14, Fed. R. Crim. P., these obviously properly joined offenses, Rule 8(a), Fed. R. Crim. P., was made either before or during trial on this ground which is urged in this Court for the first time. See (*Jerry D.*) *Gray v. United States*, 123 U.S. App. D.C. 39, 356 F.2d 792 (1966); *Rhone v. United States*, *supra*. Unlike the situations in *Drew v. United States*, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964), or *Gregory v. United States*, 125 U.S. App. D.C. 140, 369 F.2d 185 (1966), the offenses here occurred within minutes of each other and all related to the robbery and efforts to escape apprehension therefor. Furthermore, the government's evidence against appellant as an aider and abettor of either offense would be the same at a separate trial of each offense and appellant's defense to all of the charges would be the same as that offered at this trial. Finally, that the jury carefully considered each offense separately is manifested by its inquiry concerning the point of L. Shelton's initial identification, and any possible claim of prejudice to appellant due to the joinder of all three counts is plainly unfounded in view of the verdict of acquittal on the first two counts of the indictment against him. See (*Jesse L.*) *Barnes v. United States*, *supra*.

- IV. The trial court's identification instruction which included the term "involved," when viewed in its proper context and in conjunction with the charge as a whole could not have misled or confused the jury.

(Tr. 702-17, 719-22)

Appellants Barber, Hudson, and W. Shelton allege that the trial court's use of the term "involved" in its "identification" instruction must have misled and confused the jury in its understanding of the government's burden of proof in establishing the requisites of "participation" under the court's earlier instruction on "aiding and abetting." However, viewing the use of this term in the context of the instruction on identification in which it was given and considering that instruction in conjunction with the charge as a whole, it is clear that the jury could not have been so misled and confused.

After instructing on the government's burden of proof beyond a reasonable doubt and the elements of each crime charged (Tr. 702-12), the court carefully and in detail instructed on "aiding and abetting" and the requisite degree of "participation" to establish guilt as an aider and abettor (Tr. 712-17). After instructing on "flight and concealment" (Tr. 719-20), the court gave the following "identification" instruction:

Now, on the matter of identity. Of course, it is not the burden of the defendant to show that he is not the person involved in any one or more of the crimes charged in this indictment, but the burden of proof is on the government to show that a defendant was the person involved as to each count in which he is charged.

If you find that the Government has failed to establish beyond a reasonable doubt the identity of any one of the defendants as to any one of the crimes with which he is charged, then you need proceed no further as to such defendant or such count, but will find that defendant not guilty as to such count.

If, however, you believe that the Government has proved beyond a reasonable doubt, considering all the evidence in the case, the exhibits in the case, and the inferences which reasonably may be drawn therefrom, that a defendant was involved in any one or more of the counts in which he is charged, *then as to such count you will further consider whether the Government has proved the essential elements of the offense charged in such count or counts.*

I instruct you that testimony as to identity is to be scrutinized with care. In this connection you should consider the length of time the witness as to identity had under observation the person involved in the crime, and the circumstances under which the observation was made including the lighting conditions, the excitement of the moment, and any other factors which seem to be pertinent in view of the circumstances of the observation of the crime and the perpetration thereof.

You may also consider whether a witness identifying a defendant knew the defendant before the alleged crime and the nature and extent of such knowledge.

You may consider the reports made by the witnesses after the crime and the description given by the witnesses to the police of the persons involved in the crime, and this includes the statements made by the witnesses immediately after the crime and those made at a later time.

After considering all of these matters, plus any other matter including any part of the evidence that the jury may feel pertinent to the question of identity, the jury must then determine whether in view of all the circumstances of the case the Government has proved the identity of a defendant as the individual involved in the crime in which they are variously charged in the counts. (Tr. 720-22) (Emphasis added)

It is clear, therefore, that this instruction was not in any way related to the question of participation required for aiding and abetting or the ultimate proof of guilt be-

yond a reasonable doubt. The court was instead telling the jury that the government had the burden of establishing the identity of the appellants as the individuals observed by the various witnesses to these crimes; in other words, the jury must find that it was appellants who were "involved" and not some other individuals who the witnesses had mistakenly taken to be appellants. If the jury were not satisfied beyond a reasonable doubt of the identity of any appellants as to any charge against him, then it was to consider that charge against him no further and to acquit. However, if the jury were satisfied beyond a reasonable doubt of any appellant's identity on any count or counts, then it must "further consider whether the government has proved the essential elements of the offense charged in such count or counts" (Tr. 721).

Hence, this instruction more than adequately fulfilled the requirements of the guidelines set forth by this Court in (*Robert S.*) *Jones v. United States*, 124 U.S. App. D.C. 83, 88, 361 F.2d 537, 542 (1966):

* * * When the defendant has placed the prosecutor's identification of him in issue, either by his own direct denial, by the production of alibi witnesses, or by impeachment of opposing witnesses, and when the defendant asks for a special instruction on the issue of identification, the district court should frame an instruction adapted to the evidence in the particular case. Such special instruction should point out to the jury that the evidence raises the question of whether the defendant was in fact the criminal actor and necessitates the juror's resolving any conflict in testimony upon this issue. The instruction should, of course, point out that the burden of proof is upon the prosecution with reference to every element of the crime charged and this burden includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime charged.

V. The trial court did not abuse its discretion in denying appellant Hudson's motion to dismiss his court-appointed counsel.

(Tr. 9, 20-21, 623-30)

Following the government's *voir dire* of the prospective jury panel which appellant Hudson had interrupted, the trial judge excluded the prospective jurors and inquired of Hudson what it was he wished to say. Hudson, without having previously done so during almost six months between arraignment and trial, moved the court to dismiss his court-appointed attorney. The alleged grounds for the motion were that counsel had filed only two pre-trial motions (motions for reduction of bond and a copy of the transcript of the preliminary hearing, the same motions filed by appellant's co-defendants, both of which were granted) and that counsel had failed to contact witnesses. (Tr. 9, 20; Record in Criminal Case No. 669-66.)

In response to further inquiry by the court, appellant stated that the witnesses were his wife, his brother, and the people in whose house he was arrested. Appellant's counsel replied that this was the first time that appellant had informed him of any witnesses. (Tr. 21.) Of course, Mrs. Smith, the resident in the apartment where Hudson was arrested, testified for the government. The court denied this motion. Appellant's brother was subpoenaed but he refused to testify and Hudson's wife could not be located (Tr. 629-30). The relevance of any testimony they might have given was also seriously in question even in appellant's mind (Tr. 626-28).

It is submitted that the trial judge correctly surmised that this motion and the repeated motions throughout the trial by Hudson to dismiss his attorney were merely deliberate attempts on appellant's part to disrupt and obstruct the course of the trial and prevent his inevitable conviction in view of the overwhelming evidence against him.

That this assumption by the court was justified is clearly manifested by Hudson's misconduct on the third

day of trial and his subsequent oral request from his own written memorandum that the court declare a "mistrial" because "prejudice has resulted from my conduct" and "the jury can't be impartial after my conduct before the Court" (Tr. 623-25).

Under these circumstances it was not not an abuse of discretion for the trial court to have denied appellant's motion to dismiss his attorney made for the first time at the beginning and during the course of his trial. *Murray v. United States*, No. 20,921, D.C. Cir., October 3, 1967 (*aff'd per curiam*); *Cunningham v. United States*, No. 19,648, D.C. Cir., June 23, 1967 (*aff'd per curiam*); *Brown v. United States*, 105 U.S. App. D.C. 77, 82, 84, 264 F.2d 363, 368, 370 (*en banc*) (concurring and dissenting opinions), *cert. denied*, 360 U.S. 911 (1959). It is well settled that

An accused's right to select his own counsel . . . cannot be insisted upon or manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. *United States v. Bentvena*, *supra* at 936.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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